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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

OBIORA E. EGBUNA,
Petitioner,

v.

TIME-LIFE LIBRARIES, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Immigration Reform and Control Act of 1986 strip undocumented workers of their right as "individuals" to protection under Title VII of the Civil Rights Act of 1964?

2. Under *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995), may a prospective employee be precluded from bringing a case for discriminatory refusal to hire on the basis of a qualification-for-employment issue that the employer did not take into account in making its hiring decision?

PARTIES

All parties are identified in the caption of this case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Obiora E. Egbuna, the plaintiff in the district court and the appellant in the court of appeals, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit sitting *en banc* in *Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184 (4th Cir. 1998).

OPINIONS BELOW

The *en banc* opinion of the U.S. Court of Appeals for the Fourth Circuit is reported at 153 F.3d 184 and is reprinted in Appendix A to this Petition, at 1a-12a. The earlier panel decision is reported at 95 F.3d 353 and is reprinted in Appendix B, at 13a-21a. The district court's Memorandum Opinion of July 28, 1995, granting summary judgment to respondent Time-Life Libraries, Inc. is not reported and is reprinted in Appendix C, at 22a-24a.

JURISDICTION

The *en banc* opinion of the U.S. Court of Appeals for the Fourth Circuit was filed on August 19, 1998. On November 6, 1998, this Court granted petitioner until

December 7, 1998 to file this petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a).

STATUTES INVOLVED

The following statutes are involved in this case: Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), and the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a. The pertinent text of those statutes is set forth in Appendix E at 26a-31a.

STATEMENT OF THE CASE

Contrary to several decisions of this Court and at least four other circuits, the Fourth Circuit sitting *en banc* in this case ruled that Title VII does not cover workers who lack employment authorization under the Immigration Reform and Control Act of 1986 ("IRCA"), 8 U.S.C. § 1324a. By granting summary judgment against petitioner Obiora Egbuna because of his undocumented immigration status—a status not taken into account by his employer when it allegedly discriminated against him—the Fourth Circuit exceeded the limited role of after-acquired evidence recognized in *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995), misconstrued the import of a *prima facie* case of discrimination under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), particularly with respect to the notion of what it means to be "qualified" for employment, and resolved what it perceived to be a tension between federal immigration policy and federal antidiscrimination policy by undermining *both* the immigration policy of discouraging employment of undocumented workers *and* the Title VII policy of eliminating discriminatory employment practices.

FACTS

Obiora Egbuna, a Nigerian national who is now a permanent resident alien (Pet. App. 2a, 4a n.4), began working for respondent Time-Life Libraries, Inc. ("TLLI") as a sales representative in June 1989. Pet. App. 2a;

Jt. App. 44, 84 ¶ 2.[1] Although Egbuna had a valid student work visa when hired, that visa authorized him to work in this country only until December 1989, a limitation clearly marked on the Employment Eligibility Verification Form I-9 documents that he submitted to TLLI upon starting work. Pet. App. 2a; Jt. App. 8 (June 8, 1989 I-9 Form), 72, 84-85 ¶ 3. Petitioner remained employed by TLLI until April 1993 despite the expiration of his student work visa, receiving excellent performance evaluations and two promotions into management positions. Jt. App. 22-23, 85-56 ¶¶ 4-5.

Section 274 of IRCA makes it unlawful for an employer to hire an alien whom the employer knows does not have proper work authorization, 8 U.S.C. § 1324a (a)(1). In making the work authorization determination, employers are required "within three business days of the hire" to obtain a signed Form I-9 from the employee and to confirm that the employee has facially valid documents establishing identity and work authorization. 8 U.S.C. § 1324a(b)(1); 8 C.F.R. § 274a.2(b)(1)(ii); *see also* Jt. App. 79-80 ¶¶ 3-5 (TLLI abides by the three-day rule). IRCA also makes it unlawful for an employer to "continue to employ" an alien "knowing the alien is (or has become) an unauthorized alien with respect to such employment." 8 U.S.C. § 1324a(a)(2). Thus, if an employer knows that an employee's work authorization has expired, "the employer . . . must update the Form I-9 to reflect that the individual is still authorized to work in the United States; otherwise the individual may no longer be employed." 8 C.F.R. § 274a-2(b)(1)(vii).

Employers who violate the work authorization provisions of IRCA are subject to "employer sanctions"—escalating civil penalties beginning at $250 per violation. 8 U.S.C. § 1324a(e)(4). Criminal penalties may also be imposed if the employer is found to have engaged in a pattern or practice of violations. 8 U.S.C. § 1324a(f)(1). IRCA does *not* impose any civil or criminal liability upon

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[1] "Pet. App." refers to the Appendix attached hereto. "Jt. App." refers to the parties' Joint Appendix to the Fourth Circuit.

the alien worker who accepts or continues employment without proper work authorization, unless that worker has engaged in document fraud with respect to the Form I-9 submission (8 U.S.C. § 1324c), a circumstance not present in this case.

In early 1993, after Egbuna had become a sales team manager at TLLI, one of his supervisees, Harrison Jackson, complained to him about another supervisor's sexual harassment. Pet. App. 2a. When TLLI investigated Jackson's allegations in response to a charge filed with the EEOC, petitioner corroborated many of Jackson's allegations. Pet. App. 3a.

In April 1993, Egbuna voluntarily resigned from TLLI with the intention of returning to his family home. Pet. App. 3a. Political turmoil in Nigeria caused his plans to change, however (Jt. App. 21-23, 86 ¶ 7), and in June 1993 petitioner applied for reemployment at TLLI. Pet. App. 3a. On July 21, 1993, TLLI rejected petitioner's request for re-employment and informed petitioner that he could not return to work at the company. *Id.* Egbuna's contention in this case is that the rejection was in retaliation for his support of Jackson's harassment charges.[2]

TLLI did not ask Egbuna to submit new work authorization documents in conjunction with his June 1993 application for reemployment, nor was TLLI required to request those documents at the pre-hire stage. *See supra* at 3. In fact, Egbuna did not have work authorization in June or July 1993—as TLLI learned at petitioner's April 1995 deposition. *See* Jt. App. 73-75. On December 2, 1993, however, five months after being rejected for re-employment, petitioner obtained work authorization upon filing an application for political asylum with the

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[2] On summary judgment, TLLI acknowledged that its decision not to rehire Egbuna was for reasons connected to Jackson's harassment charges, alleging that its decision was motivated by petitioner's failure to report Jackson's allegations to the company's Human Resources Department as required by company policy, an assertion petitioner disputed. Pet. App. 2a-3a, 14a.

Immigration and Naturalization Service ("INS"). Pet. App. 4a n.4; Jt. App. 73-74, 86 ¶ 7.

On February 10, 1995, petitioner brought suit in the Eastern District of Virginia, alleging that TLLI had violated the anti-retaliation provisions of Title VII, 42 U.S.C. § 2000e-3(a), by refusing to rehire him because he had supported Harrison Jackson's sexual harassment charges. Pet. App. 2a-3a. Petitioner sought back pay, compensatory damages for emotional distress, punitive damages, and reinstatement.

TLLI moved for summary judgment based on petitioner's deposition testimony that he did not have proper work authorization in July 1993. Notably, TLLI did not contend that Egbuna's immigration status actually played any role in its refusal to re-hire. Rather, TLLI argued that petitioner's lack of work authorization precluded him from establishing a *prima facie* case of liability under Title VII as a matter of law, because petitioner could not establish that he "qualified" for employment within the meaning of *McDonnell Douglas*. Pet. App. 3a-4a.

On July 28, 1995, the district court (Bryan, Jr., J.) granted TLLI's motion for summary judgment, holding that *McDonnell Douglas* required petitioner to show, as a minimum requirement for establishing a *prima facie* case of discrimination, that he was "qualified" for the position he sought—in the sense of being *legally* qualified:

> In order to maintain this action plaintiff would have to show that at the time he was not rehired, he was qualified to perform the position for which he sought employment. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). This plaintiff cannot do because at that time he, as a foreign national, did not have an employment authorization card, a "green card."

Pet. App. 23a-42a.

Egbuna appealed to the Fourth Circuit, which reversed the district court's entry of summary judgment. *See* App.

B. Applying the plain language of Title VII (which extends coverage to all "individuals" without distinguishing based upon immigration status), and analyzing the language and legislative history of IRCA, the panel held that a Title VII plaintiff's lack of work authorization would only be relevant: 1) if it were a reason in fact for the employer's challenged employment decision; or 2) in determining the proper remedy upon a finding of unlawful discrimination. Pet. App. 19a.[3] The panel further concluded that the district court's holding could not be reconciled with *McKennon*, "in which the Court held that . . . after-acquired evidence of a legitimate basis for termination does not shield the employer for liability under the violated statute." Pet. App. 20a. Judge Russell dissented, maintaining that petitioner could not meet the *McDonnell Douglas* "qualified for employment" standard because he lacked valid work authorization when he applied for reemployment. Pet. App. 21a.

After TLLI petitioned for rehearing, the Fourth Circuit vacated the panel decision and ordered the case heard *en banc*. After further argument, the full court issued an 8-4 *per curiam* opinion affirming the district court's grant of summary judgment. *See* App. A.

The *en banc* court broadly ruled that individuals lacking proper work authorization documents can *never* have a cause of action for discrimination under Title VII. Pet. App. 5a. Rejecting petitioner's argument that the "qualified" prong of *McDonnell Douglas* requires a plaintiff only to show that he satisfies the minimum qualifications that the employer *actually* considered in making its hiring decision, the Fourth Circuit held that Title VII also requires a plaintiff to be *legally* qualified for employment:

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[3] The panel pointed out that the scope of remedy could not be resolved on the existing record, because the facts were disputed concerning whether petitioner could have obtained work authorization in July 1993 (for example, by applying for political asylum earlier than he did, *see* 8 C.F.R. § 208.7(a); Jt. App. 86 ¶ 8) or whether TLLI would have held the job open for him until he obtained work authorization. *See* Pet. App. 21a n.5.

> When the applicant is an alien, being "qualified" for the position is not determined by the applicant's capacity to perform the job—rather, it is determined by whether the applicant was an alien authorized for employment in the United States at the time in question.

Pet. App. 5a. Although this Court had ruled in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), that undocumented workers are covered by the National Labor Relations Act's broad definition of "employee" (a definition paralleling Title VII's equally broad definition of "individual"), the Fourth Circuit distingiushed *Sure-Tan* on several grounds—most notably by concluding that Congress in 1986 implicitly overruled *Sure-Tan* when it enacted the employer sanctions provisions of IRCA, and that "to rule Egbuna was entitled to the position he sought and to order TLLI to hire an undocumented alien would nullify IRCA, which declares it illegal to hire or to continue to employ unauthorized aliens." Pet. App. 7a-8a.[4]

Judge Ervin in dissent, joined by three colleagues, disagreed that undocumented workers could never establish a cause of action for employment discrimination. First, the dissent demonstrated that nothing in the language or structure of IRCA indicated a congressional intent to limit the rights of undocumented workers under federal employment law. Indeed, as Judge Ervin pointed out, the IRCA committee reports explicitly cautioned that the new employer sanction provisions should *not* be construed "to undermine or diminish in any way labor protections in existing law." Pet. App. 8a-9a & n.1, *quoting* H.R.

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[4] Although the court suggested that *Sure-Tan* was also distinguishable because the discrimination there was directed against aliens who were already on the job rather than aliens applying for employment, the court never explained why that distinction would make any difference, and its broad holding that IRCA's work authorization provisions trump Title VII's coverage and antidiscrimination provisions necessarily applies to all workers, whether pre- or post-hire, just as that holding necessarily applies to all federal and state employment laws and not just Title VII.

Rep.No. 99-682(I) at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662.

Second, Judge Ervin pointed out that the *en banc* court misapplied the unanimous decision in *McKennon,* in which this Court held that evidence acquired *after* an adverse employment decision cannot shield an employer from Title VII liability. Pet. App. 9a-10a, *citing McKennon,* 513 U.S. at 358. Under *McKennon,* he reasoned, "[t]he question of Egbuna's work authorization is one that is pertinent only to the remedy to which he may be entitled, and not to whether TLLI acted with discriminatory animus in its employment decision making." Pet. App. 10a.

Third, Judge Ervin noted all other federal courts' agreement that judicial enforcement of the federal employment laws on behalf of undocumented alien workers actually reinforces and strengthens the federal immigration policies embodied in IRCA, because it eliminates employers' economic incentive to hire undocumented workers in order to avoid being subject to federal employment law requirements. Pet. App. 10a-11a.

Finally, Judge Ervin noted that the *en banc* court's analysis could not logically be limited to the Title VII context, but necessarily extends as well to all other anti-discrimination and worker protection laws. Consequently, "[the majority's analysis] is not only at odds with Congress's unambiguous intent, as articulated in the legislative history, but with every court that has considered IRCA's effect on federal labor laws." Pet. App. 11a.

REASONS FOR GRANTING THE PETITION

The Fourth Circuit held that an employer who discriminates in its hiring decisions is altogether shielded from Title VII liability if the job applicant is later found to have lacked work authorization under IRCA, even if the employer was unaware of the applicant's immigration status when making its hiring decision and was in fact motivated by a discriminatory purpose proscribed by Title VII. This case thus presents an opportunity for the Court

to resolve two important questions of federal employment law, each of which has divided the federal circuit courts in their application of this Court's relevant precedents. Those questions are *first,* whether IRCA implicitly amended all federal labor and employment statutes after *Sure-Tan* to eliminate all coverage under such statutes for undocumented workers; and *second,* whether there is a gaping "quasi-standing" exception to this Court's holding in *McKennon,* applicable even where the employer was exclusively motivated in making its adverse employment decision by a proscribed, discriminatory purpose, which permits employers to rely upon after-acquired evidence to demonstrate an employee's lack of the necessary initial, objective qualifications.

I. The Fourth Circuit's Conclusion That Undocumented Workers Are Not Covered by Title VII Is Contrary to the Plain Statutory Language and Legislative Purposes of Both Title VII and IRCA, and to Decisions of This Court and Every Circuit Court To Consider IRCA's Impact on the Federal Employment Law Rights of Undocumented Workers.

Except for the Fourth Circuit here, every other court and administrative agency to consider IRCA's impact on the federal employment law rights of undocumented workers has concluded that Congress did *not* intend IRCA to exempt undocumented workers from the protections of those laws. *See NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.,* 134 F.3d 50 (2d Cir. 1997); *Del Rey Tortilleria, Inc. v. NLRB,* 976 F.2d 1115 (7th Cir. 1992); *Patel v. Quality Inn South,* 846 F.2d 700 (11th Cir. 1988), *cert. denied,* 489 U.S. 1011 (1989); *NLRB v. Ashkenazy Property Management Corp.,* 817 F.2d 74 (9th Cir. 1987); EEOC Policy Guidance on the Effect of the Immigration Reform and Control Act of 1986 on the Remedies Available to Undocumented Aliens Under Title VII, EEOC Compliance Manual ¶ 3815 (April 26, 1989); General Counsel Memorandum GC 88-9, *Reinstatement and Backpay Remedies for Discriminatees Who Are "Undocumented Aliens,"* (1988 NLRB GCM LEXIS

159 (Sept. 1, 1988). And, except for the Seventh Circuit in *Del Rey Tortilleria*, each of those authorities has also concluded that nothing in IRCA precludes undocumented workers from receiving backpay and other remedies where a federal employment law violation has been found. *Id.* Consequently, review of the Fourth Circuit's decision is necessary to restore uniformity to the case law and to ensure that workers asserting statutory rights in the Fourth Circuit are not subjected to non-statutory eligibility or remedial standards that do not apply to workers, or their employers, throughout the rest of the country.

1. The Fourth Circuit's confusion begins with its failure to consider Title VII's plain statutory language, which broadly prohibits discrimination by an employer against "any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Although the statute contains explicit exceptions from coverage for certain political employees (42 U.S.C. § 2000e(f)) and "with respect to the employment of aliens *outside any State*" (42 U.S.C. § 2000e-1(a) (emphasis added)), Title VII contains no language exempting undocumented workers from its coverage.

In *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973), this Court held that Title VII's coverage language and structure made clear that "Title VII was clearly intended to apply with respect to the employment of aliens . . . ." 414 U.S. at 95. Although the facts of the case did not require the Court to determine whether that plain meaning construction extended to aliens who were "undocumented," that is precisely the result the Court reached several years later, when considering the issue under the parallel provisions of the NLRA in *Sure-Tan, Inc. v. NLRB*, 467 U.S. (1984).[5]

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[5] Because Title VII was largely modeled on the NLRA, case law under that statute is often relied upon to construe parallel provisions of Title VII. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 n.11 (1975); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 768-70 (1976); *Ford Motor Co. v. EEOC*, 458 U.S. 219,

Sure-Tan involved an employer who requested an INS raid on its own factory after its largely undocumented work force had voted for union representation. The threshold liability issue was whether the undocumented workers whom the INS had apprehended could bring charges under the NLRA's anti-retaliation provision, 29 U.S.C. § 158(a)(3). Accepting the NLRB's longstanding statutory construction, this Court concluded:

> . . . The Board has consistently held that undocumented aliens are "employees" within the meaning of § 2(3) of the Act. That provision broadly provides that "[t]he term 'employee' shall include any employee," 29 U.S.C. § 152(3), subject only to certain specifically enumerated exceptions." *Ibid.* . . . The breadth of § 2(3)'s definition is striking: the Act squarely applies to "any employee." The only limitations are specific exemptions . . . . Since undocumented aliens are not among the few groups of workers expressly exempted by Congress, they plainly come within the broad statutory definition of "employee."

467 U.S. at 891-92 (footnote and case citations omitted); *see also Rios v. Steamfitters Local 638*, 860 F.2d 1168, 1173 (2d Cir. 1988) (Title VII); *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1516-17 (9th Cir. 1989) (same).

Just as the NLRB construed the broad definition of "employee" in its governing statute to include undocumented workers, so too has the EEOC consistently interpreted Title VII's antidiscrimination provisions as protecting undocumented as well as documented "individuals." Since at least 1981, the EEOC has specifically construed Title VII as protecting undocumented aliens:

> The acceptance or rejection of a Title VII charge should not hinge upon the potential charging party's status as a documented or undocumented alien. It is the Commission's position that the term 'any indi-

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226 n.8 (1982); H.R. Rep. No. 88-914, 88th Cong., 2d Sess., *reprinted in* 1964 U.S.C.C.A.N. 2402 (1964).

> vidual' in § 703 of the Act includes any person, whether documented or not, within the jurisdictional boundaries of any 'State' " . . .

EEOC Compliance Manual (CCH) § 622.7, 3806 at 3810-11 (BNA 1982); *see also* 29 C.F.R. § 1606.1(c) (1970). The EEOC reaffirmed this construction of Title VII shortly after the enactment of IRCA and has never wavered in its basic conclusion that Title VII protects undocumented workers[6]—a conclusion that led the EEOC to file *amicus* briefs in support of petitioner in this case before both the panel and the *en banc* courts.

In enacting IRCA, Congress made clear that it saw no inconsistency between IRCA's employer sanctions provisions and the coverage of undocumented workers under federal and state employment laws, including Title VII. Although Congress in IRCA amended several statutes *other* than Title VII (generally to limit the rights of undocumented individuals), it neither amended Title VII's definition of "employee" and "individual" nor the scope of undocumented workers' coverage under Title VII (or any other employment statute).[7] Moreover, the Commit-

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[6] *See* EEOC Policy Guidance on the Effect of the Immigration Reform and Control Act of 1986 on the Remedies Available to Undocumented Aliens Under Title VII, EEOC Compliance Manual ¶ 3815 (April 26, 1989) (explaining why "it is essential to the goals of both Title VII and IRCA that undocumented aliens continue to be covered by Title VII"). The NLRB General Counsel and the Department of Labor have reached the same conclusion under the NLRA and FLSA respectively. *See supra* at 9-10; *see also* Mem. of Understanding Between Justice Dept's Immig. and Natur. Serv. and Labor Dept's Employment Standards Admin. 227 Daily Labor Report (BNA) (Nov. 25, 1998).

[7] *See, e.g.*, IRCA § 101(b)(I) (amending the Migrant and Seasonal Agricultural Worker Protection Act, Pub. L. No. 97-470); IRCA § 121(a)(1) (amending Section 1137 of the Social Security Act, 42 U.S.C. § 1320b-7); IRCA § 121(a)(2) (amending Section 214 of the Housing and Community Development Act of 1980, 42 U.S.C. § 1436(a); IRCA § 121(a)(3) (amending Section 484 of the Higher Education Act of 1965, 20 U.S.C. § 1091); IRCA § 121 (a)(5) (amending Section 16 of the Food Stamp Act of 1977, 7

tee Reports discussing IRCA's employer sanctions provisions specifically express Congress' intent that the new provisions *not* be construed to deprive undocumented workers of their existing labor law rights. Those reports warn that any restriction of coverage would encourage employers to hire undocumented rather than documented workers, and would thus undermine the legislative goal of effective immigration law enforceent.[8]

IRCA's principal goal was to curtail illegal immigration by reducing American employers' incentive to hire undocumented aliens. *See, e.g.*, H.R. Rep. No. 99-682(I) (1986) at 46, *reprinted in* 1986 U.S.C.C.A.N. 5649-50 ("Employment is the magnet that attracts aliens here illegally"). Congress recognized that as long as employers could "exploit [undocumented workers as a] source of labor," jobs for those workers would be plentiful, as would the workers' corresponding economic incentive to enter this country unlawfully. *See id.* at 47, 52, 58, *reprinted in* 1986 U.S.C.C.A.N. at 5651, 5656, 5662. By imposing sanctions on employers who knowingly hire or continue to employ undocumented workers, Congress sought to discourage employers from making jobs available to undocumented workers, thereby reducing the job

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U.S.C. 2025); IRCA § 121(a)(6) (amending the United States Housing Act of 1937, 42 U.S.C. § 1437 *et seq.*).

[8] The House Education and Labor Committee Report thus stated:

> [T]he Commitee does not intend that any provision of this Act would limit the powers of State or Federal labor standards agencies such as the . . . Equal Employment Opportunity Commission . . . to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by these agencies. To do otherwise would be counter-productive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment.

House Comm. on Educ. and Labor, H.R. Rep. No. 99-682(II) at 8-9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5788; *see also* House Comm. on Judiciary, H.R. Rep. No. 99-682(I) at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662.

opportunities that entice many undocumented individuals to immigrate illegally to this country. *Id.* at 46, *reprinted in* 1986 U.S.C.C.A.N. at 5650. As Congress recognized, however, its immigration goals could best be accomplished if undocumented workers continued to be protected by the full range of federal and state employment laws, because absent such coverage employers might still be willing to risk relatively low employer sanctions fines in order to obtain a vulnerable, exploitable workforce.[9]

2. The recognition that effective labor law enforcement furthers rather than impedes IRCA's immigration policies informs the holdings of every other circuit court to consider IRCA's impact on federal employment law. Indeed, the Fourth Circuit's holding that IRCA implicitly overruled Title VII's coverage provisions is the only case in the 13 years since IRCA's enactment to so hold.

In *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50 (2d Cir. 1997), for example, an employer discharged two undocumented union supporters who then brought an unfair labor practice charge alleging retaliation. Affirming the NLRB's holding that the discharged workers were protected by the NLRA (and entitled to a conditional reinstatement remedy plus backpay), the Second Circuit concluded that Congress in 1986 had *not* intended to strip complaining workers of statutory protection:

> The primary purpose of IRCA was to make it more difficult to employ undocumented workers and to punish the employers who offer jobs to these workers. IRCA's legislative history explains Congress's reasons for adopting this employer-focused enforcement strategy, and also demonstrates the intention to preserve the NLRA's protection of and remedies for

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[9] *See Sure-Tan*, 467 U.S. at 893-94 ("If an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened. In turn, if the demand for undocumented aliens declines, there may then be fewer incentives for aliens themselves to enter in violation of the federal immigration laws"); *DeCanas v. Bica*, 424 U.S. 351, 356-57 (1976).

> undocumented workers as one of the many elements in the federal government's strategy to protect U.S. labor markets from the effects of illegal immigration.

134 F.3d at 55. The Second Circuit also agreed with the NLRB that

> "the most effective way . . . to accommodate—and indeed to further—the immigration policies IRCA embodies is, to the extent possible, to provide the protections and remedies of the NLRA to undocumented workers in the same manner as to other employees. To do otherwise would increase the incentives for some unscrupulous employers to play the provisions of the NLRA and IRCA against each other to defeat the fundamental objectives of each, while profiting from their own wrongdoing with relative impunity. Thus, these employers would be free to flout their obligations under the Act, secure in the knowledge that the Board would be powerless fully to remedy their violations."

134 F.3d at 56-57, *quoting A.P.R.A. Fuel Oil Buyers Group*, 320 N.L.R.B. at 415.

The Eleventh Circuit adopted a similar analysis in *Patel v. Quality Inn South*, 846 F.2d 700, holding that IRCA did not limit the scope of the FLSA's protection of undocumented workers. After concluding that the FLSA's language and legislative purposes supported a finding of coverage, the Eleventh Circuit turned to the question whether IRCA implictly limited that scope. As the court explained:

> [N]othing in the IRCA or its legislative history suggests that Congress intended to limit the rights of undocumented aliens under the FLSA. . . . Indeed, the FLSA's coverage of undocumented aliens goes hand in hand with the policies behind the IRCA. Congress enacted the IRCA to reduce illegal immigration by eliminating employers' economic incentive to hire undocumented aliens. To achieve this objective the IRCA imposes an escalating series of sanctions on employers who hire such workers. *See* 8

> U.S.C. § 1324a. The FLSA's coverage of undocumented workers has a similar effect in that it offsets what is perhaps the most attractive feature of such workers—their willingness to work for less than the minimum wage. If the FLSA did not cover undocumented aliens, employers would have an *incentive* to hire them. Employers might find it economically advantageous to hire and underpay undocumented workers and run the risk of sanctions under the IRCA.
>
> We recognize the seeming anomaly of discouraging illegal immigration by allowing undocumented aliens to recover in an action under the FLSA. We doubt, however, that many illegal aliens come to this country to gain the protection of our labor laws. Rather it is the hope of getting a job—at any wage—that prompts most illegal aliens to cross our borders. By reducing the incentive to hire such workers the FLSA's coverage of undocumented aliens helps discourage illegal immigration and is thus fully consistent with the objectives of the IRCA. We therefore conclude that undocumented aliens continue to be "employees" covered by the FLSA.

846 F.2d at 704-05 (emphasis in original).

Finally, the Seventh Circuit in *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115 (7th Cir. 1992), another case arising under the NLRA, also concluded that Congress did not intend to exclude undocumented workers from federal labor law protections. Although the Seventh Circuit disagreed with the other circuits on the issue of remedy (*see infra* at 18 n.12), it concurred with all the other circuits that have addressed the question, except the Fourth Circuit, that undocumented workers have a valid *claim* under the NLRA, and it read IRCA and its legislative history as *reaffirming* this Court's "holding [in] *Sure-Tan*, that undocumented aliens are employees within the meaning of the NLRA." 976 F.2d at 1121.

3. Although the Fourth Circuit in this case held that petitioner had "no cause of action" under Title VII (Pet.

App. 5a), the court might have meant only that employees lacking work authorization could not proceed under Title VII because they would not be entitled to any of the specific remedies available under Title VII if they prevailed.[10] If that were the court's intended meaning, however, it made no effort to justify its holding by explaining, on a remedy-by-remedy basis, precisely *why* or *how* IRCA would be violated by an order granting one or more of those remedies—which include backpay, front pay, injunctive relief, compensatory damages (*e.g.*, for emotional distress, *see* Jt. App. 87 ¶¶ 10, 90), punitive damages, and injunctive relief.[11] In fact, while remedial orders issued under one statute should not directly conflict with rights or obligations under another (*see, e.g., Sure-Tan*, 467 U.S. at 903; *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942)), the only employment law remedy that might directly conflict with IRCA's employer sanctions provisions would be an order requiring the employment of a worker who cannot produce proper employment authorization when legally required to do so. That is why, for example, the Second Circuit in *A.P.R.A. Fuel Oil Buyers Group*, 134 F.3d at 53, 58, awarded a *conditional* reinstatement remedy—*i.e.*, conditioned upon the discriminatees' satisfying IRCA's work authorization requirements within a reasonable period of time. No reason appears why IRCA would preclude any other remedies.

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[10] *See* Pet. App. 5a ("We find, however, that Egbuna has no cause of action because his undocumented status rendered him ineligible both for the remedies he seeks and for employment within the United States"); *id.* (emphasis in original) ("A plaintiff is entitled to the above remedies *only* upon a successful showing that the applicant was qualified for employment"); Pet. App. 7a-8a ("to rule Egbuna was entitled to the position he sought and to order TLLI to hire an undocumented alien would nullify IRCA, which declares it illegal to hire or to continue to employ unauthorized aliens").

[11] Indeed, the court seemed unware that Title VII had been amended in 1991 to provide compensatory and punitive damages, in addition to the previously-available equitable remedies. *See* Pet. 5a.

Even if the *en banc* decision *were* construed as holding only that undocumented workers are not entitled to the particular statutory remedies of Title VII, a circuit conflict could still not be avoided. Rather, the Fourth Circuit's decision here would simply exacerbate the already existing conflict identified by both the Seventh Circuit in *Del Rey Tortilleria* and the Second Circuit in *A.P.R.A. Fuel Oil Buyers Group* concerning the availability of backpay and reinstatement remedies for workers who were undocumented at the time of their employer's challenged decision.[12] The instant case thus presents the Court with an opportunity to resolve that conflict, at least in part, by construing the plain language and legislative purposes of Title VII and IRCA to determine the extent, if any, of the statutory inconsistencies.

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[12] *See Del Rey Tortilleria*, 976 F.2d at 1115 n.*, 1119 (acknowledging conflict between Ninth Circuit's pre-IRCA decision in *Local 512, Warehouse & Office Workers' Union v. NLRB ("Felbro")*, 795 F.2d 705, 719 (9th Cir. 1986), and its holding that undocumented workers could not recover backpay for the period they lacked proper work authorization because they were not "harmed in a legal sense"); *NLRB v. A.P.R.A. Fuel Oil Buyers Group*, 134 F.3d at 58 ("the Seventh Circuit concluded too hastily that Congress [in IRCA] rejected the reasoning of [the Ninth Circuit] in *Felbro*. Indeed, in our view, IRCA demonstrates a Congressional intent to punish the employers of illegal aliens, not to grant them any additional reward for their illegal actions. And, as this court [in *Rios*] has already adopted *Felbro*'s thoughtful and well-grounded reasoning, we see nothing in IRCA that limits the Board's power to grant a remedy of backpay that is tailored to the verification requirements of IRCA"). The Seventh Circuit's analysis of the backpay issue also conflicts with the Ninth Circuit's post-IRCA reaffirmation of *Felbro* in *NLRB v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987), and with the Eleventh Circuit's decision in *Patel v. Quality Inn South*, 846 F.2d 700 (although the Seventh Circuit sought to distinguish *Patel* on the ground that the worker there was underpaid for work performed, rather than not paid for work unperformed, *see* 976 F.2d at 1122 n.7). In addition, the Seventh Circuit's analysis is inconsistent with the position taken by the NLRB and its General Counsel, and by the EEOC, each of which have concluded that Congress intended undocumented victims of discrimination to be entitled to at least some make whole remedies under the federal labor laws.

II. The Fourth Circuit's Reliance on the Employer's After-Acquired Evidence of Petitioner's Undocumented Immigration Status Is Contrary to *McKennon* and *McDonnell Douglas*, to Decisions of Several Circuit Courts, and to Title VII's Underlying Antidiscrimination Policies.

Quite aside from the fact that the Fourth Circuit's ruling exacerbates the existing circuit conflict on IRCA's employment law impacts, that ruling also deepens a conflict among the federal circuits concerning the application of *McKennon* and *McDonnell Douglas* to cases in which the employer discriminates on an impermissible basis but later ascertains that plaintiff lacked an initial qualification for the job established either by the employer or by external law. The Fourth Circuit's approach to that basic, generic Title VII issue reflects a fundamental misunderstanding of Title VII as construed by *McKennon* and *McDonnell Douglas*. For, the Fourth Circuit's holding (and similar holdings by the Seventh Circuit) compromises the bedrock antidiscrimination principle that an employer may not "treat[] 'some people less favorably than others because of their race, color, religion, sex, or national origin [and other proscribed classification]." *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 576 (1978), *quoting Teamsters v. United States,* 431 U.S. 324, 335 n.15 (1977). In the Fourth and Seventh circuits, employers *may* treat "some people less favorably than others," based on proscribed criteria, as long as it turns out that the discriminatees did not satisfy some "objective" qualification for employment, albeit one that the employer did not consider in making its decision.

1. The federal courts of appeals, both before and after *McKennon,* have split on whether "after-acquired" evidence that a worker lacked initial qualification for employment precludes the worker's employment discrimination suit:

a. The Fourth Circuit in this case and the Seventh Circuit in a line of cases from *Gilty v. Village of Oak*

Park, 919 F.2d 1247 (7th Cir. 1990), through *Senner v. Northcentral Technical College*, 113 F.3d 750 (7th Cir. 1997), read Title VII (and other employment laws) as incorporating "quasi-standing elements" (*Gilty*, 919 F.2d at 1251) that require a threshold "successful showing that the applicant was qualified for employment" (Pet. App 5a) based on "an objective standard" of qualification as to which the "employer's knowledge or lack of knowledge [of the applicant's failure to meet that qualification] is of no relevance." *Gilty*, 919 F.2d at 1247; *see Senner*, 113 F.3d at 755 ("A plaintiff must show he was qualified for the position he sought, or else he cannot prove injury.")[13] Those cases derive their objective qualification, "quasi-standing" approach from one of the elements of a *prima facie* case of hiring discrimination articulated in *McDonnell Douglas v. Green*, 411 U.S. at 802; *see Gilty*, 919 F.2d at 1251 (referring to "the quasi-standing elements set out in *McDonnell Douglas*"); Pet. App. 21a (Russell, J., dissenting from panel opinion).[14]

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[13] To further complicate the confusion, the Seventh Circuit on a closely-related question has subscribed to the view that an employer may not defend a discriminatory firing based on information acquired after the discharge indicating that the plaintiff was not initially qualified for the position he or she held, because "[t]he deterring statutory penalty is for retaliatory firing, the character of which is not changed by some after discovered alternate reason for discharge which might otherwise have been used, but was not." *Kristufek v. Hussmann Foodservice Co.*, 985 F.2d 364, 369 (7th Cir. 1993); *see also Smith v. General Scanning, Inc.*, 876 F.2d 1315, 1319 (7th Cir. 1989).

[14] While the *en banc* opinion does not provide any citation for its quasi-standing holding (*see* Pet. App. 5a), the author of the *en banc* opinion, Judge Russell (*see* Pet. App. 1a n.*), relied upon *McDonnell Douglas* in making the same point in his dissent to the original panel decision. Pet. App. 21a.

That this "quasi-standing" analysis retains influence despite this Court's *McKennon* decision is demonstrated not only by this case and *Senner*, but also by recent reliance on the *Gilty* analysis by a federal district court outside the Fourth and Seventh Circuits. *See King v. Stanislaus Consol. Fire Protection Dist.*, 985 F.Supp. 1228, 1232 (E.D. Cal. 1997).

b. The Third, Fifth, and Eleventh Circuits, in contrast, maintain that because employment discrimination cases turn on the employer's *actual* motivation for adverse decisions (as this Court held in *McKennon*), initial hiring qualifications that were not in fact taken into account by the employer are simply irrelevant in determining whether the employee states a claim, although such qualifications may be pertinent, as *McKennon* held, to the remedies available if unlawful discrimination is established. *See Mardell v. Harleysville Life Ins. Co.*, 31 F.3d 1221 (3d Cir. 1994) (*"Mardell I"*), *vacated*, 115 S.Ct. 1397, *reaffirmed and reinstated upon remand*, 65 F.3d 1072, 1973 (3d Cir. 1995) (*"Mardel II"*) (rejecting the contention that "the plaintiff lacks standing because he or she was not qualified for the position" because "what is relevant to the inquiry is the employer's subjective assessment of the plaintiff's qualifications, not the plaintiff's objective ones if unknown to the employer"); *Wallace v. Dunn Construction Co., Inc.*, 62 F.3d 374, 378-79 (11th Cir. 1995) (citations omitted) (rejecting, in reliance on *McKennon*, the argument that "one who obtains a job or employment contract by misrepresentation has . . . no standing to sue for alleged employment-related wrongs"); *Shattuck v. Kinetic Concepts, Inc.*, 49 F.3d 1106, 1108-09 (5th Cir. 1995) (rejecting the employer's argument that *McKennon* does not apply if the plaintiff would not have been hired initially had her true qualifications been considered); *cf. Smith v. Secretary of the Navy*, 659 F.2d 1113, 1120 n.57 (D.C. Cir. 1981) (pre-*McKennon* case rejecting a standing argument based on *McDonnell Douglas* qualification prong).

The Third Circuit in *Mardell* directly addressed the contention that the *McDonnell Douglas prima facie* case incorporates a "quasi-standing" principle applicable to all employment discrimination cases, rejecting that contention as unsound and inconsistent with basic employment discrimination principles:

> The plaintiff's *McDonnell Douglas* prima facie case was formulated to identify circumstances under which

> the discriminatory motive or intent of the employer may be *inferred*. . . . Consequently, what is relevant to the inquiry is the employer's subjective assessment of the plaintiff's qualifications, not the plaintiff's objective ones if unknown to the employer. In other words, the strength of the inference of discrimination based on the prima facie case is independent of the plaintiff's qualifications that were unknown to the employer.
>
> The no-standing argument additionally runs counter to the plain meaning of Title VII and ADEA. Those statutes grant standing to "any individual" discriminated against by a covered employer. *See* 42 U.S.C.A. § 2000e-2(a) (1981). . . . The point is that neither definition contains an exception for . . . employees who measured against some objectively defined criteria are 'unqualified.' Congress having granted standing . . . the matter is settled.

31 F.3d at 1230-31 (footnotes omitted); *see also Smith*, 659 F.2d at 1120 & n.57 (concluding that, to have standing to sue under Title VII, a plaintiff need only show that he is a "person aggrieved" within the meaning of 42 U.S.C. § 2000e-5(b), (f), and that "[w]here the plaintiff is a victim of prohibited discrimination by an employer subject to the Act, he plainly falls within the zone of protected interests [and therefore has standing to sue]").

2. The Fourth Circuit's "quasi-standing" approach not only deepens the circuit conflict on this basic, recurring issue of Title VII law, but also: a) reflects a basic misunderstanding of the role and nature of the "qualification" concept in the *McDonnell Douglas* line of cases; b) misapprehends the kinds of injuries from which Title VII provides protection; and c) cannot be reconciled with this Court's decision in *McKennon*.

a. In *McDonnell Douglas*, 411 U.S. at 802, this Court established an evidentiary sorting device to assist district courts in evaluating claims of discrimination. To survive summary judgment under the *McDonnell Douglas* framework, a Title VII plaintiff who does not present direct

proof of discriminatory motive must meet the initial evidentiary burden by establishing a *prima facie* case of discrimination. That burden may be met with a showing by plaintiff:

> (i) that he belongs to a racial minority [or other protected group]; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants.

Id.; see also St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993); *U.S. Postal Service Board of Governors v. Aikens,* 460 U.S. 711 (1983); *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981); *Furnco Corporation v. Waters,* 438 U.S. 567 (1978).

The *McDonnell Douglas prima facie* case approach does not, however, as it could not, replace the provisions of Title VII itself regarding the elements necessary to establish liability. Rather, *McDonnell Douglas* and its progeny simply provide a means, applicable in some but not all Title VII cases, to help analyze the determinative factual question in all Title VII disparate treatment cases:

> The central focus of the inquiry in a case such as this is always *whether the employer is treating "some people less favorably than others because of their race, color, religion, sex, or national origin [or other proscribed criteria]."* The method suggested in *McDonnell Douglas* for pursuing this inquiry, however, was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the *critical question of discrimination.* A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not *based on the consideration of impermissible factors.*

Furnco, 438 U.S. at 577 (emphasis added) (citations omitted); *see also Burdine*, 450 U.S. at 253 (the "ultimate burden" in a Title VII case is to "persuad[e] the trier of fact that the defendant intentionally discriminated"; *McDonnell Douglas* standards are designed "to bring the litigants and the court expeditiously and fairly to this ultimate question"); *Aikens*, 460 U.S. at 714-16 (the *McDonnell Douglas* standards may not be used to "evade[] the ultimate question of discrimination *vel non*;" that question concerns "the employer's mental processes").

The *McDonnell Douglas prima facie* case standards, then, simply facilitate in certain circumstances the critical determination whether "the employer had relied on a forbidden factor under Title VII in making an employment decision." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 270 (1989) (O'Connor, J., concurring). But meeting those standards is not the only way to prove a Title VII disparate treatment case. Either direct evidence of discriminatory motive or other circumstantial evidence patterns from which discriminatory motive may fairly be inferred are equally valid approaches, and once the case has been tried to the trier of fact the question whether plaintiff has met the *McDonnell Douglas* standards is no longer even pertinent.[15]

Given the true, limited office of the *McDonnell Douglas* standards, it becomes apparent that the "qualification"

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[15] *See, e.g., id.; McDonnell Douglas*, 411 U.S. at 802 n.13 ("The facts necessarily will vary in Title VII cases, and the specification . . . of the prima facie proof required from [a plaintiff] is not necessarily applicable . . . to different factual situation); *Teamsters v. United States*, 431 U.S. at 358 ("The importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act"); *Aikens*, 460 U.S. at 715 ("Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant").

prong of those standards cannot possibly serve as a basis for the "quasi-standing," objective qualification approach to after-acquired evidence of initial qualifications sanctioned by the Fourth Circuit here and by the Seventh Circuit in the *Gilty* line of case, for three reasons.

First, as *Mardell I* noted (*see supra* at 21), Title VII itself does not limit the group of individuals protected from employment discrimination, or authorized to file suit for discrimination, to those determined by some objective standards to be eligible for employment. Since *McDonnell Douglas* simply implements, but does not alter, the basic provisions of Title VII, its *prima facie* case standards cannot create a limitation on filing suit under Title VII not contained in the statute itself.

Second, and along the same lines, the *McDonnell Douglas* standards are intended to aid in ascertaining the employer's motive in making an adverse employment decision, not to create a requirement *in addition* to illicit motive for establishing Title VII liability. A qualification requirement that could not have been relied upon by an employer at the time the adverse decision was made because not inquired into at the time is of no probative value whatever in determining the employer's state of mind at the time of decision. Correspondingly, an employee's "objective" failure to meet a qualification cannot in any way negate or weaken an otherwise supportable inference that the employer was probably relying on an impermissible criterion where—as here—it is undisputed that whatever the reason for the employer's actions, that reason was *not* the employee's "objective" disqualification.

Finally, the *McDonnell Douglas* standards are not universally applicable in Title VII cases, but are pertinent only where the plaintiff relies on circumstantial rather than direct evidence, only if some other combination of circumstantial evidence is not equally or more persuasive under the particular circumstances, and only until the parties make their full factual presentations to the trier of fact. *See supra* 24 n. 15. Consequently, *McDonnell*

Douglas and its progeny cannot possibly be the basis for deriving a universally-applicable objective qualification quasi-standing requirement for all Title VII (or all employment discrimination) cases.

The alternative suppositions—that qualifications not relied upon by the employer preclude an employee from bringing suit under Title VII if the employer chooses to rely on the *McDonnell Douglas* proof pattern but not otherwise, or if the case is decided before trial but not afterwards—are equally absurd. No reason appears, for example, why an undocumented worker whose employer announces the discriminatory basis for an adverse employment action or discovers the worker's undocumented status only at trial should be able to bring suit under Title VII, while an undocumented worker whose employer conceals a discriminatory motive or learns of the worker's undocumented status during discovery may not.

b. The only alternative to the *McDonnell Douglas prima facie* case litany that has been suggested as the basis for a "quasi-standing," "objective" qualification requirement in Title VII is the notion that an employee who lacks basic job qualifications suffers no legally cognizable "injury in fact" if illegally discriminated against. *See Senner,* 113 F.3d at 755; *King,* 985 F. Supp. at 1231 n.2. But as this Court has repeatedly indicated, in discrimination cases there is an "injury in fact" simply from being subjected to a discriminatory policy or decision, even if the plaintiff cannot prove that he or she would have fared better under a nondiscriminatory policy or decision. *See, e.g., Northeastern Florida Contractors v. Jacksonville,* 508 U.S. 656, 666 (1993); *Regents of the University of California v. Bakke,* 438 U.S. 265, 281 n. 14, 320 n. 54 (1978).

In hiring cases, it is possible that in some circumstances (such as those TLLI maintains obtain here) the trier of fact could find that, if no discrimination had occurred, the employer in pursuing its usual hiring process would have learned of the disqualificaton and taken the same adverse

employment action, with the same economic consequences (failure to hire), for the legitimate, lack-of-qualification reason. If the trier of fact so found, a limitation on economic damages might be appropriate on the theory that the actual backpay loss traceable to the discrimination can only cover the period before the lack of qualification would have been discovered in due course absent the discrimination.

But the fact that the economic losses are limited does not mean that they are nonexistent. Here, for example, it appears that it was the employer's practice to check an employee's Form I-9 documentation several days after, not before, the start of employment, and IRCA expressly permits such a three-day grace period. *See supra* at 3. Moreover, an employer might not in fact enforce established qualifications for employment, even those legally required to be enforced. Here, for example, TLLI from December 1989 to April 1993 permitted Egbuna to work without proper work authorization. *See* Pet. App. 2a. An employee may, therefore, be able to allege and prove actual economic losses in a hiring case even where he or she does not meet the employer's (or the government's) official employment qualifications.

Further, in enacting Title VII, "Congress considered reliance on [proscribed criteria] in making employment decisions an evil in itself" (*Price Waterhouse v. Hopkins*, 490 U.S. at 265 (O'Connor, J., concurring), and in amending Title VII in the Civil Rights Act of 1991, Congress specifically provided for compensatory and punitive damages to remedy the injuries other than lost wages caused by violation of the statute. 42 U.S.C. § 1981a(b); H.R. Rep. No. 102-40(I), 102nd Cong., 1st Sess. 64-65 (1991) (Act provides remedies for injuries to "careers, . . . mental and emotional health, and . . . self-respect and dignity"). Since Title VII expressly recognizes and protects such injuries due to employment discrimination, an employee who alleges such injuries—as Egbuna has done here—has alleged a legally-cognizable harm and should be entitled to pursue his claims.

c. Finally, the Fourth Circuit's "quasi-standing" approach to the initial qualification issue is flatly inconsistent with this Court's holding in *McKennon*, a case that differs from this principally in that: 1) the employer in *McKennon* attempted to rely on after-acquired evidence of misconduct while employed, rather than on lack of initial qualifications, as a basis for nonsuiting a plaintiff in an employment discrimination case; and 2) the employment standards violated by the employee in *McKennon* were established by the employer itself, rather than by the government.[16] These distinctions are of no moment under the reasoning of *McKennon*.

McKennon started from the premise that the fundamental purpose of employment discrimination statutes such as Title VII is " 'the elimination of discrimination in the workplace' " (513 U.S. at 358), and consequently that "[t]he disclosure through litigation of incidents or practices which violate national policies respecting nondiscrimination in the workplace is itself important." Since the "employer's motives" in taking an adverse action are "an essential element in determining whether the employer violated the federal discrimination law," the goal of uncovering, deterring, and compensating victims of discrimination must focus on the employer's actual motives for its actions; otherwise, employers would likely continue to act for illegal, discriminatory reasons. *Id.* at 360. And because an "employer could not have been motivated by knowledge it did not have and . . . cannot claim that the [employment action was taken] for [a later-discovered] nondiscriminatory reason" (*id*), *McKennon* allows employees to proceed with their employment discrimination cases (albeit with a possible limitation on the available remedies) even if their employer could have taken the

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16 Although *McKennon* involved a discriminatory discharge rather than a discriminatory falure to hire, the Fourth Circuit in this case nowhere indicated that its result would have been different if Egbuna had worked for a period before being discharged for retaliatory reasons, but was later discovered to have lacked work authorization while working.

same action for legal reasons had it possessed information at the time of the decision that it only discovered later.

Nothing in this line of reasoning is affected by either of the possibly pertinent distinctions between this case and *McKennon*. Qualifications for *initial* employment (such as possession of certain educational and experiential background) are no more or less enforceable, absent discrimination, than qualifications for *continued* employment (such as trustworthiness, promptness, or achievement of specified production goals). While government-imposed qualifications for employment (such as IRCA work authorization status or possession of a required license) may for public policy reasons be respected by a court devising remedies for an illegal employment practice (*see, e.g., NLRB v. Future Ambulette, Inc.*, 903 F.2d 140, 145 (2d Cir. 1990)), *McKennon* recognizes that protecting "the lawful prerogatives of the employer in the usual course of its business" to "exercis[e] . . . discretion[] in the course of the hiring, promotion, and discharging of their employees" is also a recognized public policy, arising from the employment discrimination statutes themselves, and similarly may counsel limitations on the available equitable remedies. 513 U.S. at 361.

That *McKennon* cannot be squared with the Fourth Circuit's "quasi-standing" holding in this case is perhaps best demonstrated by the fact that the *very same* "lack of standing" propositions advanced by TLLI in this case comprised almost all of the legal argument presented to this Court in *McKennon*, but not considered of sufficient moment even to merit specific discussion in the *McKennon* opinion. *See* Brief for Respondent in No. 93-1543 at 24-40; *id.* at 24-26 (arguing that the employee in *McKennon* lacked "standing" because she suffered "no invasion of a legally protected interest and, consequently, no judicially cognizable injury"); *id.* at 35-40 (arguing that the plaintiff in *McKennon* could not maintain her suit because, under *McDonnell Douglas*, "she was not qualified for the job she held" since "[h]er misconduct 'disqualified' her");

id. at 38-39 (relying expressly on *Gilty's* "objective" *McDonnell Douglas* analysis).

The Fourth Circuit, in short, simply flaunted *McKennon* by its ruling in this case. Pet. App. 9a. For that reason, as well as to resolve two deep and important conflicts among the circuits and to clarify the import and role of the *prima facie* case analysis of *McDonnell Douglas* and its progeny, this Court should grant certiorari.

CONCLUSION

For the reasons stated above, this Court should issue a writ of certiorari to the Fourth Circuit, reverse the Fourth Circuit's holding that petitioner Obiora Egbuna is precluded from maintaining this action, and order this case remanded to the district court so the employment discrimination action may proceed.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 95-2547

OBIORA E. EGBUNA,
Plaintiff-Appellant,

v.

TIME-LIFE LIBRARIES, INCORPORATED,
Defendant-Appellee,

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Amicus Curiae.

Argued March 4, 1997
Decided Aug. 19, 1998

Before WILKINSON, Chief Judge, RUSSELL, WIDENER, MURNAGHAN, ERVIN, WILKINS, NIEMEYER, HAMILTON, LUTTIG, WILLIAMS, MICHAEL, and MOTZ, Circuit Judges, and HALL, Senior Circuit Judge.*

Affirmed by published per curiam opinion, in which Chief Judge WILKINSON, Judge WIDENER, Judge WILKINS, Judge NIEMEYER, Judge HAMILTON, Judge

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* The opinion in this case was prepared by Circuit Judge Donald S. Russell. Judge Russell died prior to the time the decision was filed. The remaining members of the court majority continue to concur in his opinion.

LUTTIG, Judge WILLIAMS, and Senior Judge HALL joined. Judge ERVIN wrote a dissenting opinion, in which Judge MURNAGHAN, Judge MICHAEL, and Judge MOTZ joined.

OPINION

PER CURIAM.

Obiora E. Egbuna brought this employment discrimination action against his former employer, Time-Life Libraries, Inc. ("TLLI"), alleging that TLLI refused to rehire him in retaliation for his having participated in another employee's discrimination suit against TLLI. The district court granted summary judgment to TLLI finding that Egbuna had not established a prima facie case of employment discrimination. A panel of our circuit reversed the district court's ruling. Before the case was remanded to the district court, however, a majority of this court granted a rehearing *en banc*. This decision follows.

I.

TLLI hired Egbuna, a Nigerian national, in June 1989. When TLLI hired Egbuna, he possessed a valid student work visa issued by the Immigration and Naturalization Service ("INS"). Although Egbuna's work visa expired six months after he was hired, TLLI apparently failed to note that it had expired, and Egbuna continued to work for TLLI until April 1993.[1]

During Egbuna's employment with TLLI, a subordinate of Egbuna, Harrison Jackson, told Egbuna that he had been sexually harassed by a supervisory employee. Egbuna failed to report these complaints to higher management, or to TLLI's Human Resources Department, in violation of company policy. But when TLLI investigated Jackson's allegations, after Jackson filed a charge

[1] The record reveals that TLLI's hiring policy was to refuse uniformly to hire prospective alien employees who fail to produce valid identification and proof of authorization for employment.

of dicrimination against TLLI with the Equal Employment Opportunity Council alleging that he had been the victim of unlawful sexual harassment in the workplace, Egbuna corroborated many of Jackson's allegations.

In April 1993, Egbuna voluntarily resigned from TLLI because he intended to return to Nigeria. When his plans changed, he approached TLLI in June 1993 about reemployment. At that time, Egbuna was still unauthorized to work in the United States, because he had never attempted to renew his visa.[2] On the twenty-first of July, TLLI informed Egbuna that he would not be hired.

Contending that TLLI had extended him an employment offer on July nineteenth and withdrew the offer on the twenty-first because Egbuna had corroborated many of Jackson's allegations of sexual harassment, Egbuna sued TLLI for violating section 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a). Section 2000e-3 provides that discrimination by an employer against an employee or applicant for employment who has participated in a Title VII investigation, proceeding, or hearing constitutes an unlawful employment practice.

TLLI moved for summary judgment on the grounds that it never made Egbuna an offer on July 19, 1993, and that even if TLLI had extended an offer to Egbuna, TLLI could not have employed him because of his undocumented alien status. The district court granted TLLI's motion. Relying on *McDonnell Douglas Corp. v. Green*,[3] the district court found that Egbuna could not demonstrate that he was a victim of discrimination, because at the time he sought employment, Egbuna was unqualified for the position he sought by virtue of his

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[2] Egbuna's deposition reveals that he never attempted to renew his visa because he feared deportation and did not want to alert the authorities of his illegal immigration status.

[3] 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

failure to possess legal documentation authorizing him (an alien) to work in the United States.[4]

II.

We review the grant of summary judgment *de novo*.[5] TLLI is entitled to summary judgment if there is no genuine issue of material fact for trial and TLLI is entitled to summary judgment as a matter of law.[6] To be successful in its motion for summary judgment, TLLI must show the absence of evidence to support Egbuna's case.[7] Conversely, to defeat TLLI's motion, Egbuna must demonstrate the existence of a genuine trial issue of fact without relying upon mere allegations or denials of his pleading.[8] We may affirm the grant of summary judgment on grounds other than those relied upon by the district court.[9]

Allegedly TLLI offered Egbuna a job in July 1993 and then rescinded its offer two days later because Egbuna had participated in Jackson's suit against TLLI.[10] Egbuna

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[4] Egbuna was eventually granted temporary work authorization in January 1994, in connection with his application for political asylum. Thus, from December 1989 through January 1994, Egbuna was unemployable in the United States.

[5] *Nguyen v. CNA Corp.*, 44 F.3d 234, 236 (4th Cir. 1995).

[6] Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323, 106 S.Ct. 2548 91 L.Ed.2d 265 (1986).

[7] *Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir. 1994).

[8] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). *See also Shaw*, 13 F.3d at 798 ("A mere scintilla of evidence supporting the case is insufficient.").

[9] *Keller v. Prince George's County*, 923 F.2d 30, 32 (4th Cir. 1991).

[10] Conspicuously, the individual who allegedly made the offer and revocation of employment, and who indicated TLLI did not hire Egbuna for retaliatory reasons, was neither deposed by Egbuna nor named on his witness lists.

maintains these facts present a classic case of retaliation. We find, however, that Egbuna has no cause of action because his undocumented status rendered him ineligible both for the remedies he seeks and for employment within the United States.

Pursuant to Title VII, a plaintiff may seek equitable remedies from the courts for the discriminatory employment practices of an employer.[11] The remedies include the hiring of the applicant, reinstatement, back pay, and injunctions against further violations.[12] The goal of awarding these equitable remedies is to make the complainant whole without imposing large monetary penalties upon the employer.[13]

A plaintiff is entitled to the above remedies *only* upon a successful showing that the applicant was qualified for employment. When the applicant is an alien, being "qualified" for the position is not determined by the applicant's capacity to perform the job—rather, it is determined by whether the applicant was an alien authorized for employment in the United States at the time in question. Congress so declared in the Immigration Reform and Control Act of 1986 ("IRCA"), which was enacted to reduce the influx of illegal immigrants into the United States by eliminating the job magnet.[14] IRCA declares it unlawful for employers to employ, recruit, or refer for a fee all unauthorized aliens.[15] IRCA identifies unauthorized aliens as those individuals who at the particular time

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[11] 42 U.S.C.A. § 2000e-5(g) (1994).

[12] *Id.*

[13] *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975) (Title VII remedies serve to restore the complainant to the position he would have been in absent the discrimination).

[14] Statement by President Ronald Reagan Upon Signing S. 1200, 22 *Weekly Comp. Pres. Doc. 1534*, (Nov. 10, 1986).

[15] 8 U.S.C.A. § 1324a (West Supp. 1997).

relating to employment are aliens neither lawfully admitted for permanent residence, nor authorized to be so employed by IRCA or by the Attorney General.[16]

To ensure, therefore, that employers do not hire unauthorized aliens, IRCA mandates that employers verify the identity and eligibility to work of each new-hire by examining specified documents *before* they begin work.[17] If an alien applicant is unable to present the required documentation, the unauthorized alien cannot be hired.[18] Similarly, if an employer unknowingly hires an unauthorized alien, or if the alien becomes unauthorized while employed, the employer is compelled to discharge the worker upon discovery of the worker's undocumented status.[19] IRCA specifically states:

> It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.[20]

Employers who violate IRCA are punished not only by a series of civil fines,[21] but are also subject to criminal penalties of up to $3,000 for each unauthorized alien so employed, and/or imprisonment for not more than six months for a pattern or practice of such violations.[22] IRCA thus statutorily disqualifies any undocumented alien from being employed as a matter of law.

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16 *Id.* § 1324a(h)(3).

17 *Id.* § 1324a(b).

18 *Id.* § 1324a(a)(1).

19 *Id.* § 1324a(a)(2).

20 *Id.*

21 *Id.* § 1324a(e)(4).

22 *Id.* § 1324a(f)(1).

Regardless of the fact that IRCA proscribes the relationship between an unauthorized alien and an employer, Egbuna cites *Sure-Tan, Inc. v. NLRB*,[23] to support his contention that Title VII protects unauthorized aliens from employment discrimination occurring during the hiring process. *Sure-Tan*, a National Labor Relations Act ("NLRA") case which extended NLRA protection to illegal alien employees, is inapplicable to the case at hand for three reasons. First, *Sure-Tan*, is not a case in which the alleged discrimination occurs during the hiring process. The unauthorized aliens in *Sure-Tan* experienced discrimination *after* they were hired and while they were employees of Sure-Tan. Second, *Sure-Tan* is a pre-IRCA case which reasons that because "the employment relationship between an employer and an undocumented alien is . . . not illegal under the [Immigration and Nationality Act ("INA")], there is no reason to conclude that application of the NLRA to employment practices affecting such aliens would necessarily conflict with the terms of the INA." [24] Third, IRCA effected a monumental change in our country's immigration policy by criminalizing the hiring of unauthorized aliens.

Given Congress' unequivocal declaration that it is illegal to hire unauthorized aliens and its mandate that employers immediately discharge unauthorized aliens upon discovering their undocumented status, we cannot reverse the district court's grant of summary judgment in favor of TLLI. To do so would sanction the formation of a statutorily declared illegal relationship, expose TLLI to civil and criminal penalties, and illogically create an entitlement simply because Egbuna *applied* for a job despite his illegal presence in this country and despite his having been statutorily *disqualified* from employment in the United States. In this instance, to rule Egbuna was entitled to the position he sought and to order TLLI to hire

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[23] 467 U.S. 883, 104 S.Ct. 2803, 81 L.Ed.2d 732 (1984).

[24] *Id.* at 893, 104 S.Ct. 2803.

an undocumented alien would nullify IRCA, which declares it illegal to hire or to continue to employ unauthorized aliens.

III.

For the foregoing reasons, we affirm the district court's grant of summary judgment.

AFFIRMED

ERVIN, Circuit Judge, dissenting:

Because of the procedural posture of the case, we must assume that TLLI refused to hire Egbuna in retaliation for his participation in a co-worker's Title VII action and that TLLI, when it engaged in its retaliation, was unaware that Egbuna was without authorization to work in this country. The question, then, is whether an undocumented alien can ever prove a *prima facie* case of employment discrimination. Perceiving a conflict between IRCA's proscription of hiring undocumented aliens and federal employment discrimination statutes, the majority holds that employers cannot be held accountable under Title VII for adverse employment actions taken against undocumented aliens. For a number of reasons, the majority's analysis is misguided.

First, there is no conflict between IRCA and Title VII. Nothing in IRCA suggests that Congress intended to limit the rights of undocumented aliens under federal labor and anti-discrimination laws. To the contrary, the legislative history explicitly cautions that IRCA should *not* be interpreted as extinguishing an undocumented alien's rights under these statutes:

> [T]he committee does not intend that any provision of this Act would limit the powers of State or Federal labor standards agencies such as the . . . Equal Employment Opportunity Commission . . . to remedy unfair practices committed against undocumented

> employees for exercising their rights before such agencies or for engaging in activities protected by these agencies.

House Comm. on Educ. and Labor, H.R.Rep. No. 99-682(II), at 8-9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5757, 5758.[1] Because Egbuna was denied employment in retaliation for "engaging in activities protected by [the EEOC]," *see id.*, I think it obvious, as a matter of congressional intent, that IRCA does not operate as a bar to Egbuna's claim.

Second, the majority's opinion defeats Congress's desire to eradicate employment discrimination in which an employer retaliates against an employee, or former employee, for participating in a Title VII investigation. The pertinent question in anti-discrimination cases is whether the employer was motivated by a discriminatory animus at the time of the adverse employment action against the employee. This is the clear holding of a unanimous Supreme Court in *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 115 S.Ct. 879, 130 L.Ed.2d 852 (1995). *McKennon* held that after-acquired evidence of a legitimate basis for an employee's termination could not shield an employer from liability under the Age Discrimination in Employment Act ("ADEA").[2] The Court found that after-acquired evidence was relevant only to

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[1] This understanding of IRCA is echoed in the report for the House Committee on the Judiciary. *See* H.R.Rep. No. 99-682(I), at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662 ("It is not the intention of the Committee that the employer sanctions provision of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by existing law.").

[2] Analysis of the *McDonnell Douglas* burden-shifting scheme in ADEA cases applies with equal force to claims under Title VII. *Gillins v. Berkeley Elec. Coop. Inc.*, 148 F.3d 413, 416 n.* (4th Cir. 1998).

the question of the remedy to which the employee was entitled. *Id.* at 360-62, 115 S.Ct. 879. The Court's decision was based on the value of effectuating the purpose of the ADEA: "the elimination of discrimination in the workplace." *Id.* at 358, 115 S.Ct. 879. "The disclosure through litigation of incidents or practices which violate national policies respecting nondiscrimination in the work force is itself important. . . . The efficacy of[the ADEA's] enforcement mechanisms becomes one measure of the success of the Act." *Id.* at 358-59, 115 S.Ct. 879. Following the Court's reasoning in *McKennon*, TLLI should be held liable if it is found to have retaliated against Egbuna in violation of Title VII. The question of Egbuna's work authorization is one that is pertinent only to the remedy to which he may be entitled, and not to whether TLLI acted with discriminatory animus in its employment decision making.

Third, as the Eleventh Circuit observed in the context of the Fair Labor Standards Act ("FLSA"), enforcement of federal employment laws actually reinforces and strengthens laws, such as IRCA, that aim to stop illegal immigration. *See Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir.1988).

> If the FLSA did not cover undocumented aliens, employers would have an *incentive* to hire them. Employers might find it economically advantageous to hire and underpay undocumented workers and run the risk of sanctions under the IRCA. . . . By reducing the incentive to hire such workers the FLSA's coverage of undocumented aliens helps discourage illegal immigration and is thus fully consistent with the objectives of the IRCA.

Id. at 704-05. The majority's decision, in effect, relieves employers of their obligation to comply with federal employment laws, other than penalties under IRCA, with regard to any undocumented workers they might employ. This interpretation of IRCA may provide an employer

with an economic incentive to hire undocumented workers and, therefore, not only fails to effectuate the anti-discrimination provisions of Title VII, but also works *against* IRCA's goal of curtailing illegal immigration.[3]

Finally, the majority's decision presumably reaches beyond Title VII and extinguishes an undocumented alien's rights under the ADEA and the Americans with Disabilities Act, both of which require that an employee be "qualified" in order to hold an employer liable for unlawful discrimination. *See Henson v. Liggett Group, Inc.*, 61 F.3d 270, 274 (4th Cir.1995) (requiring that applicant prove "she was *qualified* for a job" as part of the ADEA prima facie case) (emphasis added); 42 U.S.C. § 12112(a) (1994) (providing that "[n]o covered entity shall discriminate against a *qualified* individual with a disability") (emphasis added). Under the majority's reasoning, I assume that undocumented aliens are also no longer considered to be "employees" for purposes of the National Labor Relations Act ("NLRA") and the FLSA since the majority holds that IRCA "statutorily disqualifies any undocumented alien from being *employed* as a matter of law." *Maj. op.* at 187 (emphasis added). Such a view is not only at odds with Congress's unambiguous intent, as articulated in the legislative history, but with every court that has considered IRCA's effect on federal labor laws. *See NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50, 56 (2d Cir.1997) (NLRA applies to to undocumented aliens); *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1121 (7th Cir. 1992) (NLRA applies to undocumented aliens); *Patel*, 846 F.2d at 704-05 (FLSA applies to undocumented aliens); *EEOC v. Tortilleria "La Mejor"*, 758 F.Supp. 585, 590-91 (E.D. Cal. 1991) (Title VII applies to undocumented aliens).[4]

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[3] The above three arguments are more fully set forth in my opinion for the panel in this case. *See Egbuna v. Time-Life Libraries, Inc.*, 95 F.3d 353 (4th Cir.1996), *vacated* (Dec. 17, 1996).

[4] While these cases disagree about the remedies that might be available to an undocumented alien, in particular whether IRCA

The majority's decision is contrary to the unambiguous intent of Congress in IRCA as revealed in the legislative history, the antidiscrimination aims of Title VII, the immigration policy Congress sought to advance through IRCA, and the unanimous caselaw from our sister circuits. For these reasons, I respectfully dissent. I am authorized to state that Judges Murnaghan, Michael, and Motz join in this dissent.

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forbids a backpay award, *compare A.P.R.A. Fuel Oil*, 134 F.3d at 56-58 (awarding backpay) *with Del Rey*, 976 F.2d at 1121-22 (refusing to award backpay), all these cases agree that undocumented aliens' right to proceed under federal labor and anti-discrimination laws survives IRCA.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 95-2547

OBIORA E. EGBUNA,
Plaintiff-Appellant,

v.

TIME-LIFE LIBRARIES, INCORPORATED,
Defendant-Appellee.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Amicus Curiae.

Argued May 8, 1996
Decided Sept. 13, 1996

Before RUSSELL and ERVIN, Circuit Judges, and NORTON, United States District Judge for the District of South Carolina, sitting by designation.

Reversed and remanded by published opinion. Judge ERVIN wrote the majority opinion, in which Judge NORTON joined. Judge RUSSELL wrote a dissenting opinion.

OPINION

ERVIN, Circuit Judge:

We must decide whether a Title VII plaintiff must demonstrate that he is eligible to work in the United States under the Immigration Reform and Control Act of 1986 to establish a prima facie case of employment

discrimination. We find that work eligibility is not part of the prima facie case, and therefore reverse the district court's summary judgment.

I.

Appellant Obiora Egbuna, a Nigerian national, was employed by appellee Time-Life Libraries ("TLLI") from June 1989 until April 1993. When Egbuna was initially hired, he was authorized by the Immigration and Naturalization Service ("INS") to work in the United States. Harrison Jackson, a TLLI employee whom Egbuna supervised, reported to Egbuna that he had been sexually harassed by another employee; Egbuna cooperated with TLLI's internal investigation and corroborated some of Jackson's allegations. In April 1993, Egbuna voluntarily resigned from TLLI, but sought reemployment in June 1993. By this time, Egbuna's authorization to work in the United States had expired, and in fact had expired before the end of his prior employment with TLLI. Although the company apparently initially offered to rehire him, TLLI ultimately withdrew this offer, claiming that Egbuna had not followed company policy in reporting Jackson's complaints.

Egbuna sued TLLI, alleging that the company had refused to rehire him because of his participation in enforcement proceedings related to Jackson's complaints, in violation of Title VII, 42 U.S.C. § 2000e-3(a) (1988). The district court required Egbuna to prove that he was qualified for the position he sought in order to show that he was a victim of discrimination. Memorandum Opinion, *in* Joint Appendix at 93-94 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)). Because Egbuna lacked employment authorization (a "green card"), he could not show that he was qualified, the court found. Accordingly, the court granted summary judgment for TLLI. Egbuna timely filed his notice of appeal; Fourth Circuit jurisdiction thus lies under 28 U.S.C. § 1291.

II.

Summary judgments are reviewed *de novo* on appeal. *E.g., Higgins v. E.I. Du Pont de Nemours & Co.*, 863 F.2d 1162, 1167 (4th Cir. 1988); *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1127-28 (4th Cir. 1987).

This appeal involves the interaction of two separate federal statutes. One is Title VII, which makes it unlawful to discriminate in employment. 42 U.S.C. § 2000e *et seq.* The second is the Immigration Reform and Control Act of 1986 ("IRCA"), which makes it illegal to knowingly employ an unauthorized alien. 8 U.S.C.A. § 1324a(a)(1) (Supp.1996). We must decide whether an undocumented alien—ineligible to work under the IRCA—may bring a Title VII action for failure to hire. This is a question of first impression in this circuit.

Egbuna sued TLLI under 42 U.S.C. § 2000e-3(a), which provides that it is an illegal employment practice to discriminate against an applicant for employment "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." This court has explained that the proof scheme set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S.Ct. 1817, 1824-25, 36 L.Ed.2d 668 (1973), applies in § 2000e-3 retaliation claims.[1] *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985). First, the employee must make out a prima facie case of retaliation by showing three elements: "1) the employee engaged in protected activity; 2) the employer took adverse employment action against the employee; and 3) a causal connection existed

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[1] This is an unusual case in that Egbuna alleges that the failure to hire was retaliatory. Usually, someone who is not hired does not have a prior relationship with the employer and the refusal to hire is alleged to have been discriminatory rather than retaliatory.

between the protected activity and the adverse action." [2] *Id.* Once a prima facie case is established, the employer may proffer a legitimate, nondiscriminatory reason for its action, which rebuts the presumption of retaliation. *Id.* This shifts the burden back to the employee, who must show that the employer's reason is pretextual. *Id.*

TLLI concedes that Egbuna engaged in protected activity, and that it did not rehire him. Thus, Egbuna has met the first two requirements of a prima facie case. TLLI argues that the only issue at the summary judgment stage was "whether Egbuna, who could not have been hired by TLLI, can demonstrate a causal connection between the protected activity and TLLI's failure to employ him." *Id.* Egbuna argues that he has satisfied the minimal requirements of the prima facie case standard, including the third element, by alleging that "the Company declined to [rehire him] based solely upon his witness status."

As far as we can determine, only one other court has addresed the specific question before us here,[3] and that

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[2] Although the *Ross* court explained that the illegal conduct must be the "but-for" cause of the challenged action in the retaliation context, the Civil Rights Act of 1991 amended Title VII to provide that a statutory violation has occurred if "race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m) (Supp. III 1991). The Civil Rights Act does not specifically address unlawful employment practices as defined by § 2000e-3(a), the statute under which Egbuna seeks recovery.

[3] Before the enactment of the IRCA the Supreme Court acknowledged that Title VII protects aliens against discrimination. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95, 94 S.Ct. 334, 340, 38 L.Ed.2d 287 (1973). In *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 104 S.Ct. 2803, 81 L.Ed.2d 732 (1984), also decided before the IRCA, the Supreme Court held that undocumented aliens are considered "employees" within the definition of the National Labor Relaions Act. *Id.* at 892, 104 S.Ct. at 2808-09 (1984). The *Sure-Tan* Court specifically noted that the Immigration and Nationality Act ("INA"), which regulated entry into the United States, did not

court held that unauthorized aliens are protected under Title VII despite the provisions of the IRCA. *EEOC v. Tortilleria "La Mejor"*, 758 F.Supp. 585, 593-94 (E.D. Cal.1991). An undocumented-alien employee filed a Title VII sex discrimination claim. *Id.* at 586. The court found that Title VII applied to undocumented aliens, and noted that the EEOC has always so construed the statute. *Id.* at 589. The court then considered whether the enactment of the IRCA altered the scope of Title VII's protections, and concluded that "Congress did not intend that the IRCA amend or repeal any of the previously legislated protections of the federal labor and employment laws accorded to aliens, documented or undocumented, including the protections of Title VII." *Id.* at 592-94; *see also EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1517 n. 10 & n. 11 (9th Cir. 1989) (assuming, without deciding, "that the undocumented workers in this case were entitled to the protections of Title VII," but noting that the IRCA "may well . . . change[ ] the mix of policy considerations underlying the case law which supports our conclusion that undocumented employees may recover back pay in a Title VII action").

In a Fair Labor Standards Act ("FLSA") case, the Eleventh Circuit found that the IRCA did not effect the FLSA's application to undocumented aliens, in part based on the principle that "amendments by implication are disfavored." *Patel v. Quality Inn South*, 846 F.2d 700, 704-05 (11th Cir. 1988), *cert. denied*, 489 U.S. 1011, 109

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make it "unlawful for an employer to hire an alien who is present or working in the United States without appropriate authorization." *Id.* at 892-93, 104 S.Ct. at 2809. Because the INA did not proscribe the relationship between employer and undocumented-alien employee, there was no conflict presented by applying both the INA and the NLRA. *Id.* at 893, 104 S.Ct. at 2809. In contrast to the INA, the IRCA prohibits employers from hiring employees without green cards, 8 U.S.C.A. § 1324a(a)(1), and requires verification of each potential employee's status, *id.* § 1324a(b).

S.Ct. 1120, 103 L.Ed.2d 182 (1989). That court concluded that there was no policy conflict created by applying both statutes:

> Congress enacted the IRCA to reduce illegal immigration by eliminating employers' economic incentive to hire undocumented aliens. To achieve this objective the IRCA imposes an escalating series of sanctions on employers who hire such workers. *See* 8 U.S.C. § 1324a. The FLSA's coverage of undocumented workers has a similar effect in that it offsets what is perhaps the most attractive feature of such workers—their willingness to work for less than the minimum wage. If the FLSA did not cover undocumented aliens, employers would have an *incentive* to hire them. Employers might find it economically advantageous to hire and underpay undocumented workers and run the risk of sanctions under the IRCA.
>
> . . . By reducing the incentive to hire such workers the FLSA's coverage of undocumented aliens helps discourage illegal immigration and is thus fully consistent with the objectives of the IRCA. We therefore conclude that undocumented aliens continue to be "employees" covered by the FLSA.

Id. at 705.

The crux of TLLI's argument rests on its claim that Egbuna was not qualified to work. The company argues that Egbuna's lack of work authorization rendered him unqualified, resulting in an inability to make a prima facie case of retaliatory failure to hire; therefore, TLLI argues, it need not make any showing of its motive as required by the second stage of the *McDonnell Douglas* framework. But Egbuna argues that this court "should reject [TLLI's] effort to shield its otherwise unlawful conduct by reference

to immigration law that it knowingly violated for a period of forty months." [4]

Both Egbuna and the EEOC, as amicus curiae, argue that the trial court should not have made work authorization part of the prima facie case stage, but instead should have allowed TLLI to come forward with Egbuna's undocumented status at the second stage of the *McDonnell Douglas* paradigm, as the non-discriminatory motivation for its action. Then, Egbuna argues, he could at least demonstrate a material issue of fact as to whether TLLI's proffered justification was pretextual:

> The parties' long employment relationship, most of which occurred in violation of the IRCA, [and] the glowing recommendation for reemployment from the branch manager in July 1993 urging creation of a virtually unique position for appellant [] were adequate to put in issue both whether the Company would have employed appellant in violation of immigration law in July 1993 and whether in the circumstances the Company was likely to hold the position open pending appellant's receipt of work authorization.

The EEOC argues that ineligibility to work under the IRCA "represents a potential legitimate, non-discriminatory reason for an employment decision"—not a basis for exclusion from the protections of Title VII—and "is relevant if the employer actually relied on it in making the decision." Thus, work authorization should properly be considered not at the prima facie case stage, but rather at the second stage, "if and when the employer asserts it as the legitimate, nondiscriminatory explanation for the decision." The plaintiff then has the opportunity to show

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[4] Under 8 U.S.C.A. § 1324a(a)(2), "[i]t is unlawful for a person or other entity, after hiring an alien for employment . . . , to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment."

that the employer's explanation is pretextual and that its actual motivation was discriminatory.

The district court's decision endorses a proof scheme that allows employers who have discriminated to be protected from their discrimination on the basis of information on which they did not rely. In other words, here TLLI really does not claim that it failed to rehire Egbuna because of his undocumented status, but it nonetheless is shielded from its possible Title VII violations because Egbuna turned out to be undocumented. This is contrary to the Supreme Court's decision in *McKennon v. Nashville Banner Publishing Co.*, —— U.S. ——, 115 S.Ct. 879, 130 L.Ed.2d 852 (1995), in which the Court held that, when an employee is fired for an illegal reason (there a violation of the ADEA), after-acquired evidence of a legitimate basis for termination does not shield the employer for liability under the violated statute. *Id.* at ——, 115 S.Ct. at 881.

This case involves two separate issues, despite TLLI's interest in collapsing the two. TLLI may very well have violated Title VII; and Obiora Egbuna did not have work authorization at the time he sought to be rehired by TLLI. Under the district court's ruling, TLLI would escape all liability for its possible Title VII violation because of Egbuna's undocumented status. That would be inappropriate. Instead, the parties should proceed through the *McDonnell Douglas* framework. TLLI may assert Egbuna's lack of work authorization as a legitimate nondiscriminatory basis for its decision, and Egbuna may attempt to show that the asserted basis is pretextual.

III.

We believe that the legislative effort to fight employment discrimination by protecting those who make or support allegations of improper conduct is best served by holding that a Title VII claimant need not show work authorization as part of the prima facie case. This con-

clusion does no damage to the distinct legislative decision to proscribe the hiring of undocumented workers under the IRCA. As the Eleventh Circuit noted, uniform application of this nation's labor laws removes a possible economic incentive to hiring illegal workers. An applicant's lack of work authorization remains a relevant consideration; it may be proffered by an employer as the legitimate, nondiscriminatory reason for its action, and it may ultimately be relevant to the question of remedies should a Title VII violation be established.[5]

We reverse the decision below and remand the case to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

DONALD S. RUSSELL, Circuit Judge, dissenting:

I respectfully dissent to the panel's holding to remand this case so that the parties may litigate this question under the *McDonnell Douglas* farmework. Under that framework, an employee is not to be ordered employed unless he is qualified for the sought-after position. To be qualified, an alien must possess the requisite employment authorization. Egbuna is an alien without a green card. He therefore does not qualify for employment at Time-Life Libraries, Inc., and I do not think that, merely because he is an alien, the immigration laws should be held subject to Title VII.

---

[5] *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 889, 902-03, 104 S.Ct. 2803, 2814-15, 81 L.Ed.2d 732 (1984) (reinstatement and backpay may not be appropriate for claimants who have been deported and therefore are not "available for work"). *Sure-Tan* would not necessarily dictate that Egbuna could not be reinstated or recover backpay, however, because he received work authorization only a short time after TLLI refused to rehire him. These factual questions are best left for the district court to consider on remand.

APPENDIX C

[Filed Jul. 28, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 95-197-A

OBIORA E. EGBUNA,
Plaintiff,

v.

TIME-LIFE LIBRARIES, INC.,
Defendant.

MEMORANDUM OPINION

In this Title VII action, plaintiff asserts claims for discrimination for testifying, assisting or participating in enforcement proceedings pursuant to 42 U.S.C. § 2000e-3(a). Plaintiff alleges that defendant Time-Life Libraries, Inc. ("Time-Life") refused to rehire plaintiff in retaliation for opposing employment practices which plaintiff believed to be unlawful and for assisting another employee in challenging those employment practices. This action is before the court on Time-Life's motion for summary judgment or in the alternative for partial summary judgment.

Plaintiff is a Nigerian national who worked for Time-Life from 1989 through April 1993. When Time-Life hired plaintiff in 1989, plaintiff was authorized to work in this country. While plaintiff was employed at Time-Life, another employee, Harrison Jackson, complained to plaintiff that he had been sexually harassed. Plaintiff cooperated with the Time-Life internal investigation of

the Jackson claim and apparently corroborated some of Jackson's allegations. Plaintiff then voluntarily resigned in April 1993, when he thought he was returning to Nigeria. It is uncontroverted that in June 1993, plaintiff applied to be rehired when he did not have authorization to work in the United States. On July 21, 1993, Time-Life notified plaintiff he would not be rehired.

Plaintiff's position is that even if Time-Life knew plaintiff did not have proper work authorization, Time-Life's refusal to rehire plaintiff in July 1993 was in retaliation for plaintiff's testimony in the Jackson investigation. Plaintiff further alleges that Time-Life initially offered to rehire plaintiff in July 1993 and then withdrew the offer. In December 1993, plaintiff received work authorization. Plaintiff seeks damages for past wages including wages for the time plaintiff was ineligible to work, compensation for emotional damages, and punitive damages.

Time-Life's position is that plaintiff was not authorized to work in the United States in July 1993 and therefore, not qualified to work. Time-Life also argues that under the Immigration Reform and Control Act Time-Life was not permitted to rehire plaintiff in July 1993. 8 U.S.C. § 1324(a).

In a separate order, Time-Life's motion for summary judgment will be granted. As plead, plaintiff complains he was discriminated against by Time-Life when Time-Life failed to rehire him in July 1993. The discrimination alleged is that he was not rehired because of his participation in a discrimination claim of sexual harassment. In order to maintain this action plaintiff would have to show that at the time he was not rehired, he was qualified to perform the position for which he sought employment. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). This plaintiff cannot do because at that time he, as a foreign national, did not have an employment authorization card, a "green card." The court is not persuaded that plaintiff can overcome this barrier by show-

ing that Time-Life could have hired plaintiff subject to his later obtaining an authorization or that Time-Life should have assisted plaintiff in obtaining authorization. That plaintiff did not obtain such authorization until December 1993, is more than just a bar to damages in the interim. The record is not clear as to whether the job was still available in December 1993, or whether it was brought to the attention of Time-Life in December 1993, that plaintiff was again eligible for employment. For these reasons, defendant's motion for summary judgment will be granted and this action will be dismissed.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
July 28, 1995

APPENDIX D

[Filed Jul. 28, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 95-197-A

OBIORA E. EGBUNA,
Plaintiff,

v.

TIME-LIFE LIBRARIES, INC.,
Defendant.

ORDER

For the reasons stated in the memorandum opinion this day filed, it is hereby

ORDERED that defendant's motion for summary judgment of plaintiff's Title VII claim is granted and this action is dismissed.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
July 28, 1995

APPENDIX E

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000e. Definitions

For the purposes of this subchapter—

* * * *

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

* * * *

42 U.S.C. § 2000e-1. Applicability to foreign and religious employment

(a) Inapplicability of subchapter to certain aliens and employees of religious entities

This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

* * * *

42 U.S.C. § 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * * *

42 U.S.C. § 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

* * * *

8 U.S.C. § 1324a. Unlawful employment of aliens

(a) Making employment of unauthorized aliens unlawful

(1) In general

It is unlawful for a person or other entity—

(A) to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to such employment, or

(B)(i) to hire for employment in the United States, an individual without complying with the requirements of subsection (b) of this section or (ii) if the person or entity is an agricultural association, agricultural employer, or farm labor contractor (as defined in section 1802 of Title 29) to hire, or to recruit or refer for a fee, for employment in the United States an individual without complying with the requirements of subsection (b) of this section.

(2) Continuing employment

It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

* * * *

(b) Employment verification system

The requirements referred to in paragraphs (1)(B) and (3) of subsection (a) of this section are, in the case of a person or other entity hiring, recruiting, or referring an individual for employment in the United States, the requirements specified in the following three paragraphs:

(1) Attestation after examination of documentation

(A) In general

The person or entity must attest, under penalty of perjury and on a form designated or established by the Attorney General by regulation, that it has verified that the individual is not an unauthorized alien by examining—

(i) a document described in subparagraph (B), or

(ii) a document described in subparagraph (C) and a document described in subparagraph (D).

A person or entity has complied with the requirement of this paragraph with respect to examination of a document if the document reasonably appears on its face to be genuine. If an individual provides a document or combination of documents that reasonably appears on its face to be genuine and that is sufficient to meet the requirements of the first sentence of this paragraph, nothing in this paragraph shall be construed as requiring the person or entity to solicit the production of any other document or as requiring the individual to produce such another document.

* * * *

(4) Cease and desist order with civil money penalty for hiring, recruiting, and referral violations

With respect to a violation of subsection (a)(1)(A) or (a)(2) of this section, the order under this subsection—

(A) shall require the person or entity to cease and desist from such violations and to pay a civil penalty in an amount of—

(i) not less than $250 and not more than $2,000 for each unauthorized alien with respect to whom a violation of either such subsection occurred.

(ii) not less than $2,000 and not more than $5,000 for each such alien in the case of a person or entity previously subject to one order under this paragraph, or

(iii) not less than $3,000 and not more than $10,000 for each such alien in the case of a person or entity previously subject to more than one order under this paragraph;

* * * *

(f) Criminal penalties and injunctions for pattern or practice violations

(1) Criminal penalty

Any person or entity which engages in a pattern or practice of violations of subsection (a)(1)(A) or (a)(2) of this section shall be fined not more than $3,000 for each unauthorized alien with respect to whom such a violation occurs, imprisoned for not not more than six months for the entire pattern or practice, or both, notwithstanding the provisions of any other Federal law relating to fine levels.

* * * *

8 U.S.C. § 1324c. Penalties for document fraud

(a) Activities prohibited

(1) It is unlawful for any person or entity knowingly—

(1) to forge, counterfeit, alter, or falsely make any document for the purpose of satisfy-

ing a requirement of this chapter or to obtain a benefit under this chapter,

(2) to use, attempt to use, possess, obtain, accept, or receive or to provide any forged, counterfeit, altered, or falsely made document in order to satisfy any requirement of this chapter or to obtain a benefit under this chapter,

(3) to use or attempt to use or to provide or attempt to provide any document lawfully issued to or with respect to a person other than the possessor (including deceased individual) for the purpose of satisfying a requirement of this chapter or obtaining a benefit under this chapter.

* * * *

Supreme Court, U.S.
FILED
JAN 21 1999
CLERK

No. 98-934

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

OBIORA E. EGBUNA,

Petitioner,

vs.

TIME-LIFE LIBRARIES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Can an undocumented alien who is statutorily disqualified from being hired to work in the United States under the Immigration Reform and Control Act of 1986, and who thus lacks an objective qualification required by the employer and by law, maintain a cause of action alleging that he was unlawfully denied employment in violation of the anti-retaliation provisions of Title VII of the Civil Rights Act of 1964?

PARTIES TO THE PROCEEDING

All parties are identified in the caption to this case.

CORPORATE DISCLOSURE STATEMENT

Respondent Time-Life Libraries, Inc. is a subsidiary of Time Inc., which is a subsidiary of Time Warner Inc. Respondent has no nonwholly owned subsidiaries.

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OPINIONS BELOW

The opinion of the court of appeals, *en banc*, Pet. App. 1a-12a, is reported at 153 F.3d 184. The earlier panel decision, Pet. App. 13a-21a, is reported at 95 F.3d 353. The opinion of the district court, Pet. App. 22a-24a, is not reported.[1]

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on August 19, 1998. This Court granted petitioner until December 7, 1998, to file his petition for certiorari. The petition was filed on December 7, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a).

STATEMENT OF THE CASE

Section 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), protects employment applicants from personnel actions that discriminate against them because of their opposition to practices that are unlawful under Title VII or because of their participation in an investigation, proceeding, or hearing under Title VII. Petitioner seeks review of a court of appeals' ruling that an undocumented alien who is statutorily disqualified from working in the United States by the Immigration Reform and Control Act of 1986 ("IRCA") cannot establish a claim of unlawful refusal to hire, under the anti-retaliation provisions of Title VII, against an employer who complies with the IRCA's prohibition against the hiring of undocumented aliens.

Petitioner is a Nigerian national. Pet. App. 2a. Respondent is a telemarketer that sells books and other products. In 1989, respondent hired petitioner as a telephone sales representative

1. "Pet. App." refers to the appendices attached to the petition for writ of certiorari. "Jt. App." refers to the parties' joint appendix to the Fourth Circuit.

at respondent's Alexandria, Virginia facility. Pet. App. 2a; Jt. App. 44. At that time, respondent verified that petitioner had a valid student work visa, issued by the United States Immigration and Naturalization Service, that authorized him to work in the United States. Pet. App. 2a.; Jt. App. 8. Although this authorization expired in December of 1989, petitioner was employed by respondent until April of 1993. Pet. App. 2a.

While employed by respondent, petitioner received complaints of sexual harassment from a male subordinate. *Id.* Petitioner failed to report these complaints, however, in violation of company policy. *Id.* Later, when respondent investigated a discrimination charge filed by the subordinate with the Equal Employment Opportunity Commission, petitioner corroborated many of his subordinate's allegations. *Id.* at 2a-3a.

In April of 1993, petitioner resigned his position with respondent to return to Nigeria. *Id.* at 3a. His plans changed, however, and, in June of 1993, he applied for employment in the United States with respondent. *Id.* at 3a.[2] At this time, petitioner's student visa had expired and he was in the United States illegally. Under federal law, petitioner could not be employed in the United States because he was neither lawfully admitted for permanent residence, nor authorized to be employed in the United States by the Attorney General. Pet App. 2a-3a; IRCA, 8 U.S.C. § 1324a.

On July 21, 1993, respondent informed petitioner that he would not be hired. *Id.* At that time, respondent had not yet

---

2. Prior to applying for reemployment with respondent, petitioner applied for employment with another employer, St. Anthony's Press. When St. Anthony's Press demanded that petitioner produce documentation showing that he was authorized to work in the United States, petitioner informed St. Anthony's that he could not produce this documentation because he had lost his wallet. Jt. App. 75-76.

requested documentation of petitioner's work authorization, and was not aware that petitioner lacked authorization to work in the United States. Had the employment application process continued, respondent would have learned during its legally-required hiring screen that petitioner was an undocumented alien, and, therefore, that it was illegal for respondent to hire petitioner. *See* IRCA, 8 U.S.C. § 1324a(b) (requiring pre-employment verification of authorization for employment). Respondent would not have rehired petitioner because federal law precluded respondent from hiring him. Consistent with the IRCA, respondent did not employ applicants who could not provide documentation that they could be lawfully employed in the United States. Jt. App. 79-80.

In February of 1995, petitioner filed this lawsuit alleging that respondent's refusal to hire him constituted unlawful retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a). Pet. App. 3a; Jt. App. 2. Respondent filed a motion for summary judgment, arguing that where an employer complied with the mandatory hiring requirements of the IRCA, authorization to work in the United States was a qualification that a Title VII plaintiff had to demonstrate in order to establish a *prima facie* case of hiring discrimination. Pet. App. 3a, 18a. In opposing the motion, petitioner argued that a genuine issue of material fact existed as to whether respondent would ultimately have refused to employ the petitioner because of his undocumented status. Pet. App. 19a.

The district court granted respondent's motion for summary judgment, adhering to a long and consistent line of precedent holding that a hiring discrimination plaintiff must — in order to establish a *prima facie* case — demonstrate that he possessed the objective minimal qualifications for employment. Citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973),[3] the

3. In *McDonnell Douglas v. Green*, the Court first articulated the elements that establish a *prima facie* case of employment discrimination. (Cont'd)

district court concluded that petitioner could not maintain an action for discriminatory refusal to hire because he was unqualified for employment by virtue of his failure to possess legal documentation authorizing him to work in the United States. Pet. App. 23a. Consequently, the petitioner could not demonstrate that respondent's refusal to hire him was unlawful. *Id.*

Petitioner appealed, and a divided panel of the court of appeals reversed, finding that "work eligibility is not part of the prima facie case." Pet. App. 14a. The court of appeals granted rehearing *en banc*, vacated the panel decision, and affirmed the district court. *Id.* at 2a, 8a.

The *en banc* court held that an undocumented illegal alien, who is statutorily disqualified from employment in the United States, cannot bring a claim of hiring discrimination under Title VII when he is denied employment in the United States. *Id.* 7a-8a. The court found that because the IRCA requires employers to determine the eligibility of each new hire before the person

(Cont'd)
In *McDonnell Douglas*, the complainant was an African-American who had been laid-off in the course of a general reduction in force. He applied for reemployment when the company subsequently advertised for his occupation. The company rejected his application--not because of a lack of qualifications but because of his participation in illegal activities. Within this factual context, the Court stated that the complainant could establish a *prima facie* case of racial discrimination by showing

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. at 802.

begins work, and prohibits the employment of persons unable to document their eligibility, the law "statutorily disqualifies any undocumented alien from being employed as a matter of law." *Id.* at 6a.

The court of appeals rejected petitioner's reliance on *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), where the Court found that illegal aliens were covered by the National Labor Relations Act, on the grounds that the decision did not involve discrimination in the hiring process and preceded the IRCA's criminalization of the hiring of unauthorized aliens. Pet. App. 7a.

Judge Ervin and three other members of the court dissented, arguing that the majority's decision amounted to a holding that an undocumented alien could never establish a violation of Title VII and therefore conflicted with circuit court interpretations of *Sure-Tan* and this Court's decision in *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995). Pet. App. 8a-11a.

REASONS FOR DENYING THE WRIT

The court of appeals' decision is correct, does not conflict with any other precedent, and has no application beyond the limited facts of this case.[4] No further review is warranted.

Petitioner characterizes the decision below as a broad holding that the IRCA implicitly excluded undocumented workers from coverage under the federal labor laws and created "a gaping 'quasi-standing' exception to this court's holding in *McKennon*." Pet. 8-9. Petitioner also contends that the decision conflicts with a number of post-IRCA circuit court interpretations of *Sure-Tan* and accentuates an existing conflict

4. Research reveals no other reported case in which an illegal alien has brought a wrongful failure to hire claim against an employer who could not lawfully hire him.

among the circuit courts as to the significance of evidence discovered subsequent to the employment decision at issue.

In fact, the Fourth Circuit's decision is quite narrow and does not conflict with either *McKennon* or its progeny. In *McKennon*, the Court held that evidence of theft by an employee, which was discovered post-termination and after the employer had articulated a different reason for the employee's termination, could not defeat a discrimination claim since the employee misconduct—being unknown to the employer at the time of the termination—could not have caused the employer to terminate the employee. The employer did not and could not argue that it would have learned of the misconduct prior to terminating the plaintiff's employment. The Court therefore found that the employer engaged in unlawful discrimination even though the employee's misconduct—if known—would have justified her termination. 513 U.S. at 359-63.

Here, in contrast to *McKennon*, the evidence is undisputed that respondent would have determined, prior to a final decision on whether to hire petitioner, that petitioner was an undocumented alien who was unqualified for employment as a matter of law, and, as mandated by federal law, would have refused to hire him. Thus, unlike the complainant in *McKennon*, petitioner was not and could not have been harmed by the allegedly discriminatory conduct.

The Fourth Circuit's decision does not create an exception to *McKennon* and other cases precluding an employer from defending against a discrimination claim on the basis of factors that could not have affected the decision at issue. Instead, the Fourth Circuit's decision holds only that an applicant who lacks a legally-mandated objective, minimal job qualification—that the employer in fact requires for employment—cannot establish a claim that he was discriminatorily denied employment. This holding is consistent with a long line of authority concerning

what a plaintiff must prove in order to establish a *prima facie* case of discrimination in hiring or promotion,[5] and respondent is aware of no reported case to the contrary.

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5. *See, e.g.*, **Supreme Court**: *McDonnell Douglas v. Green*, 411 U.S. 792 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); **First Circuit**: *Rodriguez-Morales v. Veterans Admin.*, 931 F.2d 980, 983 (1st Cir. 1991) (no *prima facie* case where the plaintiff lacked the requisite experience); **Second Circuit**: *Stern v. Trustees of Columbia Univ.*, 131 F.3d 305, 311-12 (2d Cir. 1997) (a plaintiff alleging discrimination under Title VII as a result of a selection decision must show, as part of the *prima facie* case, that he was qualified for the position); **Third Circuit**: *Gunby v. Pennsylvania Elec. Co.*, 840 F.2d 1108, 1115-16 (3d Cir. 1988), *cert. denied*, 492 U.S. 905 (1989) (a plaintiff can establish a *prima facie* case by showing that he possessed the qualifications set forth in the job description); **Fourth Circuit**: *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 762 (4th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3409 (U.S. Dec. 14, 1998) (No. 98-972) (plaintiff failed to establish a *prima facie* case that employer denied him position because of his race where plaintiff could not present evidence that he had the minimum qualifications necessary for the position because he did not possess the required license); **Fifth Circuit**: *Gonzalez v. Carlin*, 907 F.2d 573, 578 (5th Cir. 1990) (no *prima facie* case where the plaintiff had not yet acquired the requisite experience for the position sought); **Sixth Circuit**: *Daniels v. Board of Education*, 805 F.2d 203, 207-08 (6th Cir. 1986) (the *McDonnell Douglas* test for a prima facie case of employment discrimination "requires the plaintiff to prove . . . that he applied and was qualified for a job for which the employer was seeking applicants"); **Seventh Circuit**: *Holder v. Old Ben Coal Co.*, 618 F.2d 1198, 1202 (7th Cir. 1980) (plaintiff had not established a *prima facie* case of sex discrimination where she had not shown that she was qualified for any employment position at the time she was rejected for employment); **Eighth Circuit**: *Marzec v. Marsh*, 990 F.2d 393, 396 (8th Cir. 1993) (motive of official who allegedly excluded plaintiff from consideration was immaterial where plaintiff's promotion would have been precluded under agency rules requiring qualification that plaintiff lacked); *Hase*

(Cont'd)

Moreover, the significance of the IRCA to the decision below is merely that the statute has both established the minimum qualification in question and ensured that the employer actually determines whether the applicant possesses that qualification. While part of the court's reasoning in distinguishing *Sure-Tan* may have called into question the continuing viability of that decision in light of the IRCA, the court's discussion of *Sure-Tan* was not necessary to its holding.

I.

THE FOURTH CIRCUIT'S HOLDING DOES NOT CONFLICT WITH *McKENNON, McDONNELL DOUGLAS,* OR ANY CIRCUIT COURT INTERPRETATION OF THOSE DECISIONS.

Petitioner contends that the Fourth Circuit's decision accentuates a purported conflict in the circuit courts' treatment of "after-acquired evidence" in the employment context.

(Cont'd)
v. Missouri Div. of Employment Sec., 972 F.2d 893, 896 (8th Cir. 1992), *cert. denied*, 508 U.S. 906 (1993) (second element of the *McDonnell Douglas-Burdine prima facie* case in the failure to promote context is "that the plaintiff meets the minimum qualifications for the position"); **Ninth Circuit**: *Pejic v. Hughes Helicopters, Inc.*, 840 F.2d 667, 675 (9th Cir. 1988) (plaintiff did not establish a *prima facie* case of age discrimination in selection where there was no evidence that he was qualified for the positions in question); **Tenth Circuit**: *Thornton v. Coffey*, 618 F.2d 686, 690 (10th Cir. 1980) (to make out a *prima facie* case of discrimination in hiring plaintiff was required to prove that "he applied and was qualified for a job for which the employer was seeking applicants"); **Eleventh Circuit**: *Canino v. EEOC*, 707 F.2d 468, 470-71 (11th Cir. 1983) (employee could not make out a *prima facie* case of discriminatory denial of promotion where he lacked time-in-grade requirement for promotion); *Ferguson v. Veterans Admin.*, 723 F.2d 871, 873 (11th Cir.), *cert. denied*, 469 U.S. 1072 (1984) (employee could not make out a *prima facie* case of promotion discrimination where she lacked educational requirement for promotion).

Petitioner asserts that his undocumented status was the type of "after-acquired evidence" that the Court in *McKennon* found could not defeat an otherwise proven claim of discrimination under Title VII but could only affect the remedy. Pet. 19. In addition, petitioner contends that the Fourth Circuit's approach grafts a "quasi-standing" element onto Title VII. Petitioner argues that this aspect of the decision is similar to holdings of the Seventh Circuit and in conflict with decisions of the Third, Fifth, and Eleventh Circuits. Pet. 19-21.

The Fourth Circuit's decision does not conflict either with any decision of this Court or with any court of appeals decision, and there is no post-*McKennon* conflict among the other circuits. In *McKennon*, the Court unanimously rejected an employer's effort to defeat an age discrimination claim on the basis that improper conduct discovered subsequent to the plaintiff's termination, if known to the employer, would have caused the employer to terminate the plaintiff. Respondent does not contest that *McKennon* applies to hiring claims or that the decision's reasoning encompasses evidence concerning qualifications that would not have been considered in the hiring process. Nor does respondent contest that *McKennon*'s holding, though rendered in a case brought under the Age Discrimination in Employment Act, would apply to Title VII. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985).

Here, however, petitioner's reliance on *McKennon* is misplaced because federal law precluded the respondent from hiring the petitioner, and because it is undisputed that respondent complied with the requirements of that law both in determining an applicant's eligibility to work and in refusing to hire applicants who could not document their eligibility as required by federal law. Thus, in contrast to *McKennon*, where the subsequently discovered evidence did not demonstrate that the employer would have taken the same action regardless of any discriminatory intent, here the evidence demonstrates that

respondent would not have hired the petitioner because his undocumented status would have been disclosed during the hiring process.[6]

Petitioner obscures this critical distinction by referring to "the minimum qualifications that the employer *actually* considered" in describing the elements of a *prima facie* case articulated in *McDonnell Douglas* (Pet. 6; original emphasis); by characterizing the decision below as holding that employers may discriminate against individuals if it turns out that they lack an objective qualification, "albeit one that the employer did not consider in making its decision" (*id.* at 19); and by referring to "[a] qualification requirement that could not have been relied upon by an employer at the time the adverse decision was made because not inquired into at the time" as a factor that could not bear on motivation. *Id.* at 25. Respondent would have discovered and considered petitioner's undocumented status before the petitioner was hired, however, and that status would have precluded his employment. Petitioner's situation does not differ from any situation where a plaintiff alleges that he was discriminated against at one point in the process though he does not possess the qualifications that at a later stage in the process would have been required for his further consideration for

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6. Petitioner notes that the IRCA requires that employers secure a signed Form I-9 from the employee within three business days of hire, suggesting that the employer might have employed petitioner for up to three days before it would have discovered petitioner's undocumented status. Pet. 3, 27. The contention that petitioner might have a claim for the denial of employment for three days, however, was never made in the court of appeals, did not figure into the court of appeals' analysis, and cannot be raised for the first time here. *See United States v. Williams*, 504 U.S. 36, 41 (1992); *United States v. Ortiz*, 422 U.S. 891, 898 (1975); *Duignan v. United States*, 274 U.S. 195, 200 (1927). In any event, the possibility that there might be a basis for such a contention in this case does not provide grounds for interpreting the court of appeals' decision beyond the reasoning reflected in the decision.

employment, *see Marzec v. Marsh*, 990 F.2d 393 (8th Cir. 1993), and cases cited at note 9, *infra*, save that the preclusive effect of that lack of qualification and the inevitability of the employer's inquiring into it—given the IRCA's requirements—are more certain than in the case of almost any other qualification that might be required for a particular job. *Compare Gonzalez v. Carlin*, 907 F.2d 573, 578 (5th Cir. 1990) (plaintiff's claim was barred because he had not acquired the requisite experience for the position sought).

Accordingly, the decision below conflicts with none of the court of appeals decisions cited by petitioner. Petitioner purports to identify a conflict with the decisions in *Mardell v. Harleysville Life Ins. Co.*, 31 F.3d 1221 (3d Cir. 1994) (*Mardell I*), *vacated*, 514 U.S. 1034 (1995), *reaffirmed and reinstated upon remand*, 65 F.3d 1072 (3d Cir. 1995) (*Mardell II*), *Wallace v. Dunn Construction Co.*, 62 F.3d 374, 378-79 (11th Cir. 1995), and *Shattuck v. Kinetic Concepts, Inc.*, 49 F.3d 1106, 1108-09 (5th Cir. 1995). Pet. 21. These decisions rejected contentions that persons who had been hired could not maintain post-hire discrimination claims because they would not have been hired if their true qualifications had been known at the time they were initially employed. As demonstrated by the fact that each plaintiff had actually been hired, however, the later-discovered disqualifying information was not information that would have been discovered during the hiring process and caused the plaintiff not to be hired. *See Turnes v. AmSouth Bank, NA*, 36 F.3d 1057, 1062 n.9 (11th Cir. 1994) (relying on this Court's decision in *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403-04 n.9 (1977),[7] the Eleventh Circuit

7. In *East Texas Motor Freight*, the Court found that plaintiffs could not represent a class of persons injured by a policy that precluded transfer from city driver to over-the-road driver positions, because, lacking qualifications for the over-the-road driver position, plaintiffs were not injured by the policy. 431 U.S. at 403-04.

distinguished a situation where disqualifying information would have been discovered if the plaintiff had progressed in the hiring process from " 'after acquired evidence' " cases where the employer sought to rely on information that it would not have discovered outside the litigation.)[8]

Petitioner repeatedly characterizes the Fourth Circuit's holding as importing a "quasi-standing" element into Title VII. Pet. 20, 22, 25. In arguing that this purported aspect of the decision deepens a conflict among the circuits, petitioner likens the decision to the pre-*McKennon* case of *Gilty v. Village of Oak Park*, 919 F.2d 1247, 1251 (7th Cir. 1990), where the Seventh Circuit found that a plaintiff asserting post-hire discrimination claims could not meet "the quasi-standing elements set out in *McDonnell Douglas*" because evidence acquired after plaintiff made his claims showed that he lacked the veracity that was deemed a necessary qualification for a police officer. Pet. 19-20. Here, however, the *en banc* decision of the Fourth Circuit does not analyze the case in terms of "standing" or "quasi-standing." Moreover, the decision is critically different from *Gilty* because here it is undisputed that the petitioner's failure to meet a legally-required qualification

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8. Petitioner also cites *Smith v. Secretary of the Navy*, 659 F.2d 1113 (D.C. Cir. 1981), where the court found that a plaintiff had a cause of action to challenge a discriminatory evaluation, even though the plaintiff would not have received the promotion he sought regardless of the evaluation. Pet. 21-22. In *Smith*, however, the court found the plaintiff to be harmed by the evaluation because it both currently damaged his reputation and threatened him with the denial of future benefits. *Id.* at 1120 n.57. *See Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989) (cause of action based on discriminatory seniority system arises at the time the system is adopted even though adverse effects of system may not be felt until some time in the future). *Smith* does not conflict with the decision below, since here the petitioner had no claim of an injury other than the denial of the job that his undocumented status would have prevented him from securing.

for employment would have been considered by respondent and would have precluded petitioner from being hired.

If there is a perceived conflict among the other circuits with regard to the proper application of controlling legal principles to arguably relevant qualifications that an employer would *not* initially have considered, this case is inappropriate for examining that conflict. However, inasmuch as *Gilty* is a pre-*McKennon* decision, aspects of which might well be reexamined by the Seventh Circuit post-*McKennon*, it cannot be said to create a conflict with any of the circuit courts' applications of *McKennon*.

Petitioner also likens the decision below to the Seventh Circuit's post-*McKennon* decision in *Senner v. Northcentral Technical College*, 113 F.3d 750 (7th Cir. 1997), which petitioner reads as affirming *Gilty's* "quasi-standing" approach. Pet. 20. But while *Senner* does rely on *Gilty* for the proposition that "[a] plaintiff must show he was qualified for the position he sought, or else he cannot prove injury," 113 F.3d at 755, *Senner* does not hold that a plaintiff denied employment must demonstrate some qualification other than those that the employer in fact considers in making its selection decision. Thus, *Senner*, like the decision below, is entirely consistent with the Third, Fifth, and Eleventh Circuit decisions petitioner cites in attempting to demonstrate a conflict.

In sum, the Fourth Circuit's *en banc* decision follows more than two decades of authority holding that hiring discrimination plaintiffs must show that they possess the qualifications that the employer considers in making hiring decisions. *See* note 5, *supra*.[9]

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9. That line of authority includes cases where qualifications, as here, involve licensing requirements and other criteria apart from the applicant's ability to perform the job in question. *See Lowery v. Circuit*

(Cont'd)

Petitioner argues that decisions such as *Mardell I*, 31 F.3d at 1230-31, indicate that any absence of qualifications not known to an employer is irrelevant. Pet. 21-21. However, none of the cases cited by petitioner has involved a situation where the qualification at issue necessarily would have been considered in the course of the decision-making process. In such a context, *McDonnell Douglas* and its progeny require that a causal connection be established between a failure to hire or promote and any actions of an employer that might be motivated by proscribed considerations. *See Marzec v. Marsh*, 990 F.2d 393 (8th Cir. 1993). Absent such a connection, a plaintiff cannot establish a cause of action under Title VII.[10]

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City Stores, Inc., 158 F.3d 742, 762 (4th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3409 (U.S. Dec. 14, 1998) (No. 98-972) (plaintiff could not establish a *prima facie* case where he lacked required real estate license); *Marzec v. Marsh*, 990 F.2d 393 (8th Cir. 1993) (motive of official who allegedly discriminated against plaintiff was immaterial where plaintiff's promotion would have been precluded by agency rules); *Canino v. EEOC*, 707 F.2d 468, 470-71 (11th Cir. 1983) (employee could not make out a *prima facie* case of discriminatory denial of promotion where he lacked time-in-grade requirement for promotion); *Ferguson v. Veterans Admin.*, 723 F.2d 871, 873 (11th Cir.), *cert. denied*, 469 U.S. 1072 (1984) (employee could not make out a *prima facie* case of promotion discrimination where she lacked educational requirement for the position).

10. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). While the employment decision in *Price Waterhouse* resulted from a combination of motives, the case's holding makes clear that Title VII provided no cause of action to challenge a decision that the employer would have made regardless of any discriminatory motivation. 490 U.S. at 242 (plurality opinion). The Civil Rights Act of 1991 amended Title VII to provide that

> an unlawful employment practice is established when the complaining party demonstrates that race, color, religion,

(Cont'd)

The issue of standing was not briefed or argued in the courts below, and, as noted, the Fourth Circuit mentioned neither standing nor "quasi-standing" in its decision. However, to the extent that the decision below might be perceived as applying a quasi-standing or actual standing concept to the case before it, that concept is limited to situations where for a well-defined reason the plaintiff could not be harmed by the action he challenges. It is thus consistent with the Court's holdings on standing, which require that in order to maintain a cause of action challenging some conduct, a party must establish that he will suffer an "injury in fact" as a result of the challenged conduct. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). A person who lacks a qualification that is indisputably required for a position is not harmed by an arguably unlawful policy creating a barrier to his securing the position and hence would not have standing to challenge such policy. *See East Texas Motor Freight*, 431 U.S. at 403-04. By the same

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> sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2(m). The courts have yet to determine whether "practice" as used in this section encompasses only those decisions actually affecting an individual or also encompasses each step in an employment process, whether or not the treatment at that step in the process had any role in the employment decision at issue. This section has no bearing here, however, since it applies only to claims involving race discrimination and other factors the consideration of which is proscribed by 42 U.S.C. § 2000e-2, and not to claims based on retaliation, which is proscribed by 42 U.S.C. § 2000e-3. *McNutt v. Board of Trustees of Univ. of Illinois*, 141 F.3d 706, 709 (7th Cir. 1998); *Woodson v. Scott Paper Co.*, 109 F.3d 913, 931-36 (3d Cir. 1997), *cert. denied*, 118 S. Ct. 299 (1997); *Tanca v. Nordberg*, 98 F.3d 680, 682-85 (1st Cir. 1996), *cert. denied*, 117 S. Ct. 1253 (1997). Hence, the *Price Waterhouse* reasoning still would apply to such claims.

reasoning, an undocumented alien would not have standing to assert a claim of hiring discrimination on some legally proscribed basis in circumstances where his undocumented status would preclude his being hired, and hence preclude his being harmed by the allegedly discriminatory decision.[11] Contrary to the suggestion of petitioner, however, such reasoning would not apply to preclude challenges to post-hire conduct, such as racial or sexual harassment or discriminatory discharge, where the victim's undocumented status—or any similar disqualifying criterion that for some reason failed to prevent the individual from being hired—does not preclude the undocumented alien from being harmed by the challenged conduct.

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11. Petitioner cites *Northeastern Florida Contractors v. Jacksonville*, 508 U.S. 656, 666 (1993), and *Regents of the University of California v. Bakke*, 438 U.S. 265, 281 n.14, 320 n.54 (1978), for the proposition that a plaintiff experiences "an 'injury in fact' simply from being subjected to a discriminatory policy or decision even if the plaintiff cannot prove that he or she would have fared better under a nondiscriminatory policy or decision." Pet. 26. In *Northeastern Florida Contractors*, however, in holding that to establish standing a contractor barred from competing for certain set-aside contracts need not show that it would have received any contract absent the set-aside, the Court also held that the contractor must show that it was "able and ready to bid on contracts." 508 U.S. at 666. Thus, for example, a party lacking a license required to perform the work put up for bid could not show sufficient "injury in fact" to establish standing. Similarly, while in order to establish standing the plaintiff in *Regents of the University of California* did not have to show that he would have been admitted to medical school if the challenged minority set-aside were not in place, presumably he would have had to have been otherwise eligible to compete for admission by meeting such minimum objective qualifications as the possession of a college degree. *See Wilson v. Glenwood Intermountain Properties, Inc.*, 98 F.3d 590, 594 (10th Cir. 1996) (non-student plaintiffs lacked standing to challenge policy that allegedly discriminated on basis of gender in the rental of apartments reserved for students because, even in absence of the policy, plaintiffs would not have been qualified to rent the apartments).

II.

THE FOURTH CIRCUIT'S HOLDING DOES NOT CONFLICT WITH ANY LOWER COURT INTERPRETATION OF THIS COURT'S DECISION IN *SURE-TAN, INC. v. NLRB.*

In seeking review of the Fourth Circuit's decision, petitioner relies heavily on a purported conflict between that decision and various circuit court interpretations of this Court's decision in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984). For reasons explained above, however, neither *Sure-Tan* nor any of the cited cases interpreting it are relevant to issues raised in this case because, in contrast to those cases, the petitioner here was not affected by the refusal to hire that he seeks to challenge. With regard to its impact on the outcome here, the IRCA's significance is simply that, as in the case of a stringently enforced licensing requirement for example, the IRCA's mandate for verifying authorization to work in the United States establishes that petitioner's claim for unlawful refusal to hire must fail because petitioner could not have been hired. The compelling aspect of the instant situation is that there are few if any situations where the procedures for ensuring that the employer complies with the requirements of the law are so rigorous.[12]

Even if petitioner could have been affected by the alleged conduct, however, the decision below would not be inconsistent either with the *Sure-Tan* holding or with the cases interpreting it. In *Sure-Tan*, the Court reviewed a National Labor Relations Board order providing remedies for employees who were illegal aliens where the employer reported the employees to the Immigration and Naturalization Service ("INS") in retaliation

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12. *See* cases at note 9, *supra*.

for their union activities. In concluding that the National Labor Relations Act ("NLRA") covered aliens whose presence in the country violated the Immigration and Nationality Act ("INA"), the *Sure-Tan* decision, rendered prior to the enactment of the IRCA, noted that

> [s]ince the employment relationship between an employer and an undocumented alien is . . . not illegal under the INA, there is no reason to conclude that application of the NLRA to employment practices affecting such aliens would necessarily conflict with the terms of the INA.

Id. at 893. The Court also reasoned that enforcement of the NLRA would further the purposes of the INA by reducing the incentive of employers to hire illegal aliens, which could further reduce the incentive of aliens to violate the immigration laws. *Id.* at 893-94.

In 1986, the IRCA made it unlawful for an employer to hire undocumented aliens or to continue to employ such individuals after the employer learns of their undocumented status. The circuit courts continued to interpret *Sure-Tan* as extending coverage of federal labor and employment laws to *employees* who were undocumented aliens, however. In doing so, the courts relied on *Sure-Tan*'s reasoning that providing such coverage reduced employer incentives to hire undocumented aliens. *See NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50, 55 (2d Cir. 1997) (NLRA found to protect undocumented aliens allegedly discharged because of union activities); *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115 (7th Cir. 1992) (same);[13] *Patel v. Quality Inn South*, 846

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13. In *Del Rey Tortilleria v. NLRB*, 976 F.2d at 1118-22, the Seventh Circuit, relying on *Sure-Tan*, denied back pay to discharged employees for periods during which they were not lawfully in the United (Cont'd)

F.2d 700, 704-05 (11th Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989) (Fair Labor Standards Act found to apply to undocumented aliens); *NLRB v. Ashkenazy Property Management Corp.*, 817 F.2d 74 (9th Cir. 1987).[14]

Petitioner relies on this line of authority in arguing that the Fourth Circuit's decision creates a conflict among the circuits.[15] In doing so, petitioner repeatedly cites the reasoning in these cases, as in *Sure-Tan*, that failure to provide coverage would create an incentive for employers to hire illegal aliens. Pet. 12-16. That reasoning also figures prominently in Judge

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States. While Petitioner reads *Del Rey Tortilleria* as conflicting with the perceived holding in this case (Pet. 9, 16), petitioner also finds *Del Rey Tortilleria's* ruling on back pay to be in conflict with decisions of other circuits, and maintains that the decision below exacerbates this conflict. Pet. 18. However, since the court below made no ruling concerning back pay for a proven violation, this case would be unsuitable to resolve any conflict concerning remedial provisions of the NLRA, even assuming that identical standards would be applied under the two statutes.

14. In *Ashkenazy*, 817 F.2d at 75, the Ninth Circuit merely reaffirmed without discussion its pre-IRCA holding in *Local 512, Warehouse & Office Workers' Union v. NLRB*, 795 F.2d 705 (9th Cir. 1986). In the earlier case, the Ninth Circuit interpreted *Sure-Tan* to allow back pay for periods during which unlawfully discharged workers remained in this country, finding that the availability of back pay to discharged undocumented aliens who remained in the country would be additional disincentive for employers to hire such workers. *Id.* at 719-20.

15. Petitioner also cites *Rios v. Steamfitters Local 638*, 860 F.2d 1168, 1173 (2d Cir. 1988), and *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1516-17 (9th Cir. 1989), which are post-IRCA cases applying Title VII to undocumented aliens. Both decisions, however, involved pre-IRCA conduct, and each court noted that the result might be different under the new law. *Rios*, 860 F.2d at 1172 n.2; *Hacienda Hotel*, 881 F.2d at 1517 n.11.

Ervin's dissent. Pet. App. 10a. The need to decrease employer incentives to hire undocumented workers, however, has no applicability in the failure to hire context presented here. A holding that undocumented aliens may not maintain a cause of action for failure to hire would be fully supported by the rationales underlying those decisions.

Petitioner maintains that the court of appeals' decision stands for the proposition that undocumented aliens can maintain no cause of action for any violation of Title VII or other federal labor law. Pet. 9. Judge Ervin appears to share this view. Pet. App. 8a. However, given the Fourth Circuit's reading of the IRCA solely as rendering an undocumented alien as unqualified for employment—and its distinguishing *Sure-Tan* primarily on the basis that *Sure-Tan* did not involve a failure to hire—the Fourth Circuit's decision cannot be interpreted so broadly. *Sure-Tan*'s holding, while perhaps a proper subject for reexamination in light of the IRCA, is essentially irrelevant to the causality issue that defeats petitioner's cause of action. This, and the inapplicability of *Sure-Tan*'s reasoning to a hiring case, make this case an unsuitable vehicle for the Court to reexamine the *Sure-Tan* decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

OBIORA E. EGBUNA,
Petitioner,

v.

TIME-LIFE LIBRARIES, INC.,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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Memorandum GC 98-15, "Reinstatement and Backpay Remedies for Discriminatees Who May Be Undocumented Aliens In Light of Recent Board and Court precedent," BNA Daily Labor Report E-1 (Dec. 30, 1998) 5

ARGUMENT

Respondent TLLI's Brief in Opposition (Opp. Cert.) rests upon a fundamental mischaracterization of both the Fourth Circuit's decision and the record below. In an effort to justify the lower court's holding and to avoid the clear conflicts among the circuits on both Questions Presented, respondent repeatedly asserts, without any citation to the record, that it could not legally *and would not in fact* have re-hired Obiora Egbuna in July 1993. *See, e.g.*, Opp. Cert. 3, 6, 8, 9-10, 12-13. TLLI thereby tries to conform the Fourth Circuit's decision to cases in which plaintiffs proceeding under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), have been required to show that they met qualifications *actually imposed* by the employer in order to establish a discriminatory motive through circumstantial evidence. But respondent cannot avoid *certiorari* by so blatantly recasting the facts and holding below, nor is the *McDonnell Douglas* line of cases relevant here at all.

1. The Fourth Circuit did not base its holding or analysis on the narrow factual grounds that respondent now urges. Rather, the Fourth Circuit accepted what it understood to be TLLI's absolutist position on the unavailability of Title VII protection to undocumented workers (*see* Pet. App. 3a), and sweepingly ruled that Obiora Egbuna simply was not covered by Title VII *because he was an undocumented worker.*[1] By its terms, that ruling applies to *every* undocumented worker who is retaliated against

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[1] *See, e.g.*, Pet. App. 5a ("We find, however, that Egbuna has no cause of action because his undocumented status rendered him ineligible . . . for employment within the United States"); *id.* (emphasis in original) ("A plaintiff is entitled to [Title VII] remedies *only* upon a successful showing that the applicant was qualified for employment. When the applicant is an alien, being 'qualified' for the position is not determined by the applicant's capacity to perform the job—rather, it is determined by whether the applicant was an alien authorized for employment in the United States at the time in question. Congress so declared in [IRCA]"); *id.* 7a (emphasis in original) ("Given Congress' unequivocal declaration that it is illegal to hire unauthorized aliens *and its mandate that employers immediately discharge unauthorized aliens* upon discov-

or otherwise discriminated against in employment by *any* employer, whether that employer is law abiding or a routine IRCA violator, whether that employer requires prospective employees to submit work authorization documents *before* any job offers are made, *after* job offers are made, or *never*, and whether the discrimination involved initial or continued employment.

2. Indeed, the Fourth Circuit could not have ruled on the narrow factual grounds TLLI now puts forward, because the company's self-serving characterization of the facts is contradicted by the record below. The *only* evidence presented by TLLI on summary judgment to establish what it "would have" done was the declaration of its Regional Human Resources Director, who stated:

> 3. *After hiring a new employee* at TLLI, *on the first day of training*, the new employee is required to complete an Immigration and Naturalization Service Form I-9 and provide the identification and proof of authorization for employment required by the Immigration Reform and Control Act, 8 U.S.C. § 1325a.
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> 4. If the newly hired employee is unable to produce the required documentation, *he or she is given three days to provide it.*

Jt. App. 79 (emphasis added). That declaration on its face controverts TLLI's present characterization of the record by unequivocally establishing that: 1) TLLI did *not* have a policy of asking any new employee for work authorization documents until "[a]fter" that employee had been hired and had begun training; and 2) TLLI had a policy (as all employers must under IRCA) of giving *all*

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ering their undocumented status, we cannot reverse the district court's grant of summary judgment in favor of TLLI. To do so would . . . . expose TLLI to civil and criminal penalties, and illogically create an entitlement . . . . despite [Egbuna] having been statutorily *disqualified* from employment in the United States"); *id.* 7a-8a (emphasis added) ("to rule Egbuna was entitled to the position he sought and to order TLLI to hire an undocumented alien would nullify IRCA, which declares it illegal to hire *or to continue to employ* unauthorized aliens").

new employees *at least three days* to produce work authorization documents *after* they actually begin work. Thus, although Egbuna lacked work authorization documents in July 1993, nothing in TLLI's policy (or IRCA) precluded respondent from making him a job offer to start work either immediately or on some future date, or from actually employing him for up to three days before he was required to produce those documents.[2]

Petitioner also presented evidence that if TLLI had asked him to produce work authorization documents in July 1993, he could have complied with that request by filing his non-frivolous political asylum application, thus obtaining immediate work authorization; Egbuna did exactly that in December 1993 and obtained prompt work authorization. *See* Pet. 4-5.[3] Petitioner also argued, based on evidence that his former supervisor wanted to create a new management position just for him (Jt.App. 9-11), that TLLI would likely have kept its job offer open for a reasonable period of time after July if he needed it to obtain work authorization. Finally, petitioner argued that despite TLLI's evidence that it required work authoriza-

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[2] TLLI does not dispute that IRCA provides a three-day window period for a worker to submit work authorization documents, but contends that petitioner is precluded from relying on that fact because he did not argue it below. Petitioner, however, consistently argued that he is entitled to backpay under *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352 (1995), for *any* period he would have worked. The three-day grace period, available as a matter of law, is simply one more basis for concluding on the present record that petitioner would in fact have returned to work for TLLI for at least *some* period of time, absent the retaliatory discrimination.

[3] Jt. App. 86 (Egbuna Decl. ¶ 8) ("Had [supervisor Ian] Clarke or any Time-Life official ever said that work authorization would be a barrier to employment despite the forty months I had worked for the company without it, I could have applied for asylum sooner, and I believe that, but for my witness status in the Harrison Jackson case, the company would have accommodated me by employing me while the question of work authorization status was pending before the INS, or at the very least held the position open for me until the INS granted me authorization").

tion documents from every "new employee" (Jt.App. 79), there was a factual dispute whether TLLI would have enforced that requirement against petitioner, because: 1) Egbuna was a returning (rather than a "new") TLLI employee, with almost four years of previous employment at the company and only a two-month break in service; and 2) TLLI had employed Egbuna from December 1989 to April 1993 even though the supervisor who supported his June 1993 re-hire knew that he lacked work authorization that entire period. Jt.App. 9-11, 84-86 ¶ 3, ¶ 6.

The initial panel concluded on the basis of these arguments that the evidence raised "factual questions [that] are best left for the district court to consider on remand" concerning whether Egbuna would have been re-hired by TLLI absent retaliation. Pet. App. 19a, 21a n.5. The *en banc* court did not disagree with the panel's conclusion regarding the state of the record, but ruled in effect that because of Egbuna's immigration status when he applied for the position, he had no claim for relief even if TLLI *would* have hired him anyway, or hired him contingent on his promptly obtaining work authorization. TLLI cannot now avoid *certiorari* by recasting the Fourth Circuit's broad summary judgment holding as if it rested on facts that are either refuted by the record or the subject of substantial factual dispute.

3. Even if TLLI were correct on the facts, and even if the Fourth Circuit had rested its holding on those facts, that holding would still be contrary to the decisions of this Court in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), and *McKennon*, and to the decisions of the many circuit courts cited in the petition, and would be in no way inconsistent with *McDonnell Douglas* and its progeny, which are essentially irrelevant for present purposes.

a. In TLLI's brief discussion of the immigration law issues, it attempts to distinguish *Sure-Tan* and the post-*Sure-Tan* cases in the Second, Seventh, Ninth, and Eleventh Circuits (*see* Pet. 9-18) by arguing that this is a discriminatory refusal-to-hire case while those were dis-

criminatory discharge or illegal on-the-job treatment cases. *See* Opp. Cert. 17-20. That distinction is meaningless. Those cases held that Congress intended federal employment law to protected undocumented as well as documented workers. The reasoning of those cases fully applies to *all* claims brought under those statutes, with no exception for refusal-to-hire claims.

This Court held in *Sure-Tan* and *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973), that undocumented workers were protected under the NLRA and Title VII because the plain language and structure *of those statutes*, and the federal employment policies they served, compelled that result. *See* Pet. 10-12. Except for the Fourth Circuit below, every circuit court to revisit that issue after IRCA concluded that Congress had *not* intended to repeal or modify those holdings. *See* Pet. 12-18. Not only is IRCA devoid of any language amending the coverage provisions of Title VII or the NLRA, but the key IRCA Committee Reports repeatedly expressed Congress' intent that IRCA's new employer sanctions provisions should not be construed to deprive undocumented workers of existing employment law protections. *Id.*[4]

Neither Title VII, nor any other federal employee protective statute, nor IRCA, creates on its face an exception for hiring cases to the general principle, accepted in *Espinoza*, *Sure-Tan*, and all the post-IRCA circuit court cases, that undocumented workers are covered under those statutes. Thus, where—as here—the statute upon which suit is based generally proscribes discrimination in hiring against individuals within the statute's protections, there is no basis in IRCA for carving out an exception simply because that discrimination occurred in the hiring process. *See* Pet. 19.

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[4] The General Counsel of the NLRB recently issued a new Policy Memorandum endorsing that construction as well. *See* Memorandum GC 98-15, "Reinstatement and Backpay Remedies for Discriminatees Who May Be Undocumented Aliens In Light of Recent Board and Court precedent," BNA Daily Labor Reports at E-1 (Dec. 30, 1998).

Moreover, although TLLI persists in analyzing this as a discriminatory refusal-to-hire case, in fact this is a retaliation case, in which TLLI's victim was a former employee who engaged in protected statutory activity while previously employed. *See Robinson v. Shell Oil Co.*, 117 S.Ct. 843, 845, 849 (1997) (Title VII prohibits retaliation against former employee); *see* Pet. App. 15a n.1. Section 704(a) of Title VII, 42 U.S.C. § 2000e-3, makes it unlawful for an employer "to discriminate against any of his employees or applicants for employment . . . because he has . . . participated in any manner, in an investigation, proceeding, or hearing under this title." The gravamen of petitioner's complaint is that TLLI unlawfully retaliated against Egbuna for his *on-the-job* conduct in supporting a supervisee's sex harassment claim in early 1993 (when Egbuna was still employed by TLLI), even though that retaliation was not manifested until TLLI refused to re-hire petitioner in July 1993.

Federal immigration policy *is* furthered by Title VII's protection of undocumented workers against unlawful retaliation for on-the-job conduct. Indeed, IRCA's House Education and Labor Committee Report said as much in explaining why the new employer sanctions provisions were not intended to strip undocumented workers of their employment law rights:

> [T]he Committee does not intend that any provision of this Act would limit the powers of State or Federal labor standards agencies such as the . . . Equal Employment Opportunity Commission . . . to remedy unfair practices committed against undocumented employees *for exercising their rights before such agencies or for engaging in activities protected by these agencies. To do otherwise would be counterproductive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment.*

House Comm. on Educ. and Labor, H.R. Rep. No. 99-682(II) at 8-9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5758 (emphasis added).

Limiting Title VII's protection against retaliation, as has the Fourth Circuit, provides an incentive for employers to hire undocumented workers, *contrary to the federal immigration policy of discouraging such hiring.* For, if the Fourth Circuit's limitations stand, employers will know that: 1) because undocumented workers are not fully protected by the proscription against retaliation, they will likely suffer in silence when Title VII violations are committed against them or their co-workers; and 2) legally-employed workers as well as undocumented workers are likely to be deterred from invoking Title VII rights if any co-workers, undocumented or not, are retaliated against for supporting such invocation.

b. Respondent's principal response to petitioner's Title VII analysis is that the Fourth Circuit's "quite narrow" holding is consistent with many cases in which plaintiffs failed to establish an inference of discrimination because they did not possess a qualification "that the employer in fact requires for employment." *See* Opp. Cert. 6. As demonstrated above, the record in *this* case does *not* establish that respondent in fact imposed such a qualification, and the Fourth Circuit did not narrowly rest its holding on such an assumption. Thus, although TLLI now cites a series of cases that purportedly support the decision below (*see* Opp. Cert. 7-8 n.5), those cases merely stand for the unremarkable proposition that plaintiffs must show that they satisfied the minimum qualifications actually required for the job in proving discriminatory intent under the *McDonnell Douglas* standard.

Further, and critically, as petitioner pointed out in Pet. 22-26, the *McDonnell Douglas* criteria do not appear as prerequisites to Title VII protection in the statute, but have been judicially developed as one of several sets of criteria for determining whether a plaintiff has presented evidence sufficient to support an inference of discriminatory intent based on circumstantial evidence.[5] Where, as

[5] Indeed, in retaliation cases, "qualification" is usually not mentioned as one of the factors that the plaintiff must establish in

here, a known discriminatory motive is assumed for summary judgment purposes—and the actual motive was, in any case, *not* Egbuna's immigration status, as TLLI concedes (Opp. Cert. 2-3)—the question whether circumstantial evidence supports an inference of discrimination simply is not relevant to the issue before the Court, and the *McDonnell Douglas* line of cases has no pertinence.

3. Finally, TLLI's entire presentation assumes that under Title VII as amended, if a retaliatory or otherwise discriminatory act does not cause an actual loss of wages or other economic injury, no cause of action is available. That is not the law, especially after the Civil Rights Act of 1991. *Cf. Faragher v. City of Boca Raton*, 118 S.Ct. 2275, 2283 (1998), *citing Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (although Title VII "mentions specific employment decisions with immediate consequences, the scope of the prohibition is not limited to 'economic' or 'tangible' discrimination"); H. Rep. No. 102-40(II), 102nd Cong., 1st Sess. at 27-28 (1991) (explaining need for compensatory and punitive damages remedies in cases where plaintiff was discriminated against but suffered no economic injury).

If that is what the Fourth Circuit held, as TLLI now posits, the case is all the more certworthy. The question

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order to create an inference of discriminatory motive sufficient to survive dismissal. Rather, the elements of a *prima facie* case of retaliation are usually articulated as including: 1) that the plaintiff "engaged in statutorily protected expression"; 2) that plaintiff "suffered an adverse employment action"; and 3) that "the adverse action was causally related to the protected expression." *See, e.g., Wideman v. Wal-Mart Stores*, 141 F.3d 1453, 1454 (11th Cir. 1998); *Hashimoto v. Dalton*, 118 F.3d 671, 679 (9th Cir. 1997); *EEOC v. L.B. Foster*, 123 F.3d 746 (3d Cir. 1997); EEOC Guidance on Investigating, Analyzing Retaliation Claims, BNA Daily Labor Report at D-27 (May 26, 1998). For present summary judgment purposes, Egbuna established these three factors; in particular, he presented admissible evidence that it *was* for retaliatory reasons that TLLI refused to rehire him, so that "the adverse action was causally related to the protected expression." The question here is whether Egbuna is disqualified from proceeding *despite* satisfying these criteria, solely because of his undocumented status.

whether compensatory and punitive damages and injunctive relief are only available under Title VII, as amended, where an adverse action motivated solely by a discriminatory purpose causes actual economic damages is one of great importance, and one as to which at least four circuits (as well as this Court in *Faragher* and the other sexual harassment cases) have taken a position squarely contrary to the one TLLI ascribes to the Fourth Circuit. *See Hashimoto*, 118 F.3d at 674-76 (retaliatory negative job reference violates Title VII even if it was not the cause of a later refusal to hire by another employer); *Murphy v. Derwinski*, 990 F.2d 540, 543 (10th Cir. 1993); *EEOC v. L.B. Foster, Co.*, 123 F.3d at 754 n.4; *Smith v. Sec'y of the Navy*, 659 F.2d 1113, 1120 & n.57 (D.C. Cir. 1981); *see* Jt. App. 41-42, 87 (alleging and providing evidence on emotional distress damages).[6]

In sum, Title VII's prohibition against retaliation serves important public policies other than mere job protection. *See Hashimoto*, 118 F.3d at 674-76; *Wideman v. Wal-Mart Stores*, 141 F.3d at 1455-57; EEOC Guidance on Investigating, Analyzing Retaliation Claims, BNA Daily Labor Reports (May 26, 1998). Because of the public importance of encouraging victims of discrimination to come forward and witnesses to testify fully and freely, any retaliatory conduct by an employer that chills these protected activities is actionable. While the availabiilty and amounts of backpay, compensatory and punitive damages, and declaratory and injunctive relief would depend on the circumstances—including whether the harm suffered by

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[6] Neither the mixed-motive issue decided in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), nor the partial legislative override of *Price Waterhouse* in the 1991 Civil Rights Act is relevant on this point. *See* Opp. Cert. 14-15 n.10. To paraphrase *McKennon*, "th[is] case comes to [this Court] on the express assumption that an unlawful motive was the sole basis for the [discriminatory adverse action.] . . . . The employer could not have been motivated by knowledge it did not have and it cannot now claim that the employee was [not rehired] for the nondiscriminatory reason." Consequently, "[m]ixed motive cases are inapposite here. . . ." 513 U.S. 359-60.

the plaintiff would soon have been suffered anyway for some other non-retaliatory reason—the policies underlying 42 U.S.C. § 2000e-3 would be stymied if the employer could immunize itself from Title VII liability entirely by directing its unlawful retaliatory activity against its undocumented workers.

CONCLUSION

For the reasons stated above and in the Petition, this Court should issue a writ of certiorari to the Fourth Circuit, reverse the Fourth Circuit's holding that petitioner Obiora Egbuna is precluded from maintaining this action, and order this case remanded to the district court so that petitioner's employment discrimination action may proceed.

Respectfully submitted,

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